Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ESTHER P. EMMERMAN and
RONALD Z. EMMERMAN,

Petitioners,

v.

THE CITY OF HIGHLAND PARK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a property aggregation ordinance alone defeat a claim that a city has stripped a separately platted and independently developable plot of land of all economically beneficial use to create public open space, thus causing an unconstitutional taking of property, by requiring that the economically idled plot be treated as an appendage of a valuable, contiguous area of land?

LIST OF PARTIES

The Petitioners in this case are Esther P. Emmerman and Ronald Z. Emmerman. La Salle National Bank was formerly a party in this case as a plaintiff, as Trustee of Trust No. B8000213124. However, on March 25, 2003, the interests in Trust No. B8000213124 were conveyed in their entirety to Esther and Ronald Emmerman, leaving the Emmermans as the only Petitioners in this action.

The Respondents in this case are the City of Highland Park; the Zoning Board of Appeals of the City of Highland Park; Steven M. Levin, Chair, Zoning Board of Appeals of the City of Highland Park; Richard Becker, Cary Glenner, Marc S. Lichtman, Stephen Sickle, Elliott Wiczer, Richard A. Wolfe, Members, Zoning Board of Appeals of the City of Highland Park; Peter Waldock, Director, Highland Park Department of Community Development; Stephanie Sodke, Department of Community Development, City of Highland Park; Larry King, Forester, City of Highland Park; Howard and Rebecca Grill; Amy and Brian Herzog; Bruce Friedman; Herbert Goldberg; Philippe and Debbie Cochran; Neal Mall; Barbara and Joseph Esdale; Audrey Weinberg; Debbie and Jeffrey Elias; Mario Jedwabnik; Gail Brenner; Laura and Andrew Cohen; Marvin Marder; Robin Steinberg; Stuart and Rosalie Edelstein; Joan Friedman; Ned Zallik; Stephan and Sandra Saltzman; Sandy Grossman; Scott and Lisa Golant; Mark Shanberg; Robert and Robin Berenson; Marla Skolnik; Cindy Zallik; Paula Debofsky; Marcie and Howard Wender; Lyla Marder; Mark Debofsky; Daniel Weinberg; and Sari Goldberg.

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PETITION FOR WRIT OF CERTIORARI

Esther P. Emmerman and Ronald Z. Emmerman respectfully petition for a writ of certiorari to review the judgment of the Illinois Court of Appeals.

OPINIONS BELOW

The Opinion of the Illinois Court of Appeals, Second District, is reported at 799 N.E.2d 781 (Ill. Ct. App. 2003); it appears as Appendix A to the petition. The decision of the Circuit Court, Lake County, is unreported; it appears as Petitioners' Appendix C (Pet. App. C).

JURISDICTION

The Illinois Court of Appeals, Second District, entered judgment on October 31, 2003. (Pet. App. A-1). On March 24, 2004, the Illinois Supreme Court denied review. Pet. App. B. On June 16, this Court extended the time for the filing of this petition until August 21, 2004. Pet. App. D. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCES AT ISSUE

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

Section 150.104(A) of the Highland Park Zoning Ordinance of 1997 provides:

> When two or more parcels of land (which may contain a lot or lots of record), are adjacent and one or more of such parcels lack adequate area or width to qualify for a permitted use under the requirements of the zoning district in which such parcels are located, all of such parcels shall be maintained and used as one zoning lot for such use if such parcels have been held in contiguous ownership at any time after May 8, 1960.

STATEMENT OF THE CASE

In 2001, Esther and Ronald Emmerman set out to do what dozens of their neighbors had been allowed to do: build a modest home on a slightly undersized, separately platted, residentially zoned lot of land in an established subdivision. Pet. App. at A-4, A-7, A-37 (O'Malley, J., dissenting). The City of Highland Park decided, however, that the "openness" provided by the status quo served a "public purpose" and "should be preserved." Pet. App. at A-4. For this reason, the City denied the Emmermans' request to build on their vacant lot, making it the only undeveloped nonconforming lot in the entire area. Relying on an ordinance that required the Emmermans to treat their vacant lot as an appendage of a previously developed, contiguous lot they also owned, the City rejected the Emmermans' claim that the denial would cause severe economic harm. Pet. App. A-4, A-5, A-7, A-37 (O'Malley, J., dissenting).

The Emmermans sought just compensation under the Takings Clause of the United States Constitution, claiming that the City had stripped their vacant lot of all economically beneficial use and so caused a compensable regulatory taking. In conflict with federal and state courts, the Illinois Appellate Court concluded that the City could aggregate the Emmermans' contiguous land for purposes of takings analysis. The court specifically concluded that the Emmermans' separately platted lots had to be combined into a "unitary parcel" for constitutional takings analysis, because the lots were treated as a unitary zoning lot under a City ordinance. Pet. App. A-19, A-20, A-37 (O'Malley, J., dissenting).

Because the contiguous lot contained a valuable older home, the combination of the Emmermans' lots into one property unit made it impossible for them to show that they had suffered a taking by being deprived of *all* economically viable use of their property. Believing that it is improper for an ordinance to convert their separately platted and independently developable land into an appendage of contiguous land for takings analysis, the Emmermans now seek relief from this Court.

A. Factual Background

In 1968, the Emmermans purchased two separately platted, legal lots of record within a residential subdivision in the City of Highland Park, Illinois. Although at that time both lots were classified as too small for building under the City's regulations, one lot already contained an existing home. The other lot was vacant. Pet. App. A-3.

After briefly lowering the minimum lot size requirement to a level that would have permitted building on the Emmermans' vacant lot, the City raised the size requirements again. This increase, which remains in place today, made the Emmermans' vacant lot a nonconforming building site. Pet. App A-4. Many of the lots in the neighborhood are the same

size or smaller than the Emmermans', and so are also deemed to be non-conforming. Nevertheless, the City has allowed all to be residentially developed. Pet. A-37 (O'Malley, J., dissenting).

In 2001, the Emmermans sought to build a home on their own non-conforming vacant lot. But while the City's regulatory code generally allows individual development of nonconforming legal lots of record, there is an exception for legal non-conforming lots that are contiguous to lots under the same ownership; under the terms of an ordinance, these legal lots cannot be developed separately, but must be aggregated with the contiguous lot to form "one zoning lot."[1] Pet. App. A-3.

The Emmermans' applied for a variance from the City's regulatory scheme that would allow them to build on their vacant legal lot of record. But because the "openness created" by the pre-existing zoning scheme "serves a public purpose and should be preserved," the City denied the variance. Pet. App. A-4. The City rejected the Emmermans' claim of economic hardship because it considered the Emmermans' vacant lot to be an appendage of their contiguous, developed lot under the terms of its aggregation ordinance. Pet. App. A-31 to A-36 (O'Malley, J., dissenting), A-4. The City's decision made the Emmermans' lot the last undeveloped nonconforming lot in the

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[1] Section 150.104(A) of the Highland Park Zoning Ordinance of 1997 states, in relevant part:

> When two or more parcels of land (which may contain a lot or lots of record) are adjacent and one or more of such parcels lack adequate area or width to qualify for a permitted use under the requirements of the zoning district in which such parcels are located, all of such parcels shall be maintained and used as one zoning lot for such use if such parcels have been held in contiguous ownership at any time after May 8, 1960.

entire residential subdivision. Pet. App. A-37 (O'Malley, J., dissenting).

B. Judicial Proceedings

The Emmermans promptly challenged the denial of the variance in state court. Among other claims, they alleged that the denial had deprived them of all economically beneficial use of their vacant parcel for a public purpose and so effected an uncompensated taking of their property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. Pet. App. A-5.

The circuit court, Lake County, Illinois, granted the City's motion to dismiss all of the Emmermans' claims, including their claims under the Takings Clause of the Fifth Amendment. Pet. App. C. The Emmermans timely appealed to the Illinois Appellate Court, Second District. On September 29, 2003, that court affirmed the circuit court in all respects upon a 2-1 vote, with Justice O'Malley dissenting. Pet. App. A. On October 31, the appellate court denied rehearing and, in so doing, issued a modified opinion that explained the court's decision to deny just compensation to the Emmermans. *Id.*

To determine whether the City had effected an unconstitutional taking of the Emmermans' property by stripping their vacant lot of all economic use, the Illinois court had to "define what constitutes the relevant parcel before the regulation's effect can be evaluated." Pet. App. A-14. The court observed that "the Supreme Court has yet to define the factors used to determine the relevant parcel for takings purposes, which is commonly referred to as the 'denominator problem.'" Pet. App. A-18. However, because the Emmermans purchased the lots subject to a property aggregation ordinance and had paid a single price for the two lots, as required by the aggregation ordinance, the court concluded that the Emmermans' lots were to be treated as a "unitary parcel" for takings analysis. Pet. App. A-19.

Upon viewing the Emmermans' vacant and restricted lot as an appendage of their contiguous and developed lot for takings analysis, the majority below held that the Emmermans had failed to state a claim "that they were denied the economically viable use of the vacant property, thus defeating their [categorical takings] claim." Pet. App. A-20.

In a dissenting opinion, Justice O'Malley disagreed with the majority's understanding of the relevant takings parcel and its impact on the Emmermans' takings claim. The dissent found it

> odd that the majority so hastily accepts as fixed and settled a particular definition of the relevant parcel for takings purposes when the [United States] Supreme Court, the originator of that definition, is not willing to admit to such rigidity, and when courts and commentators are starkly divided over the proper approach to defining the relevant parcel.

Pet. App. A-34 (O'Malley, J., dissenting).

The Emmermans, the dissent noted,

> are not seeking this court's complicity in some devious "gerrymandering" of property divisions; we are not called on to give legal significance to imaginary lines so as to artificially enhance the economic harm to the Sherwood lot.

Pet. App. A-32 (O'Malley, J., dissenting).

Thus, the dissent refused to

> join the majority in accepting . . . that a landowner's claim of specific economic harm to a duly platted lot of land is to be diluted by weighing that harm against

> the value of all land held by the owner that is contiguous to the lot.

Id. (O'Malley, J., dissenting).

The dissent concluded that "the only proper approach is to recognize, as does the City's zoning ordinance, the lot line dividing plaintiffs' property and to define the relevant property for takings purposes as simply the Sherwood lot." Pet. App. A-36 (O'Malley, J., dissenting). Having identified the vacant lot as the relevant takings parcel, the dissenting justice would have held, in contrast to the majority, that "plaintiffs have successfully alleged . . . that the City's minimum lot size restrictions deny them economically viable use of the Sherwood lot." Pet. App. A-37 (O'Malley, J., dissenting).

The Emmermans petitioned the Illinois Supreme Court to review the lower court's decision and, particularly, that court's understanding of the relevant parcel for takings analysis. But, on March 24, 2004, the Illinois Supreme Court declined to review the Emmermans' case. Pet. App. B.

REASONS FOR GRANTING THE WRIT

On perhaps the most critical unresolved question of federal takings law, the court below issued a decision that is in conflict with the decisions of other lower courts, both federal and state. These conflicts warrant resolution by this Court.

ARGUMENT

I

WHETHER THE GOVERNMENT MAY AGGREGATE A SEPARATELY PLATTED AND INDEPENDENTLY DEVELOPABLE AREA OF REGULATED LAND WITH A VALUABLE ADJACENT AREA SO AS TO DEFEAT A CATEGORICAL TAKINGS CLAIM IS AN IMPORTANT UNRESOLVED QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT

A. The Issue of the Relevant Land Parcel Is Central to the Regulatory Takings Doctrine

"[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Court has made clear the regulatory takings line is crossed, and just compensation required, when a land use restriction deprives a property owner of *all* economically beneficial use of property or severely diminishes the economic value of the property, and destroys the owner's investment-backed expectations. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001). The application of these standards requires courts to measure the value and uses of property before and after application of the challenged land use restriction. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property").

But a court cannot begin to compare property values before and after regulation until it determines "the unit of property 'whose value is to furnish the denominator of the fraction.'" *See id.* In more general terms, a court cannot gauge

the economic impact of land use regulation, to determine whether it "goes too far," *Pennsylvania Coal*, 260 U.S. at 415, until it identifies the property interest that is at issue. This is often described as the "relevant parcel" question. *See* Dwight H. Merriem, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 356 (2003) ("Determining the total property against which the loss [caused by regulation] must be measured is what we call the 'relevant parcel' question.").

A broad definition of the relevant parcel will make the regulatory impact on the owner's property seem less severe and diminish the chances that a taking will be found. *See* Thomas J. Koffer, *What to "Take" from* Palazzolo *and* Tahoe-Sierra: *A Temporary Loss for Property Rights*, 21 Va. Envtl. L.J. 503 (2003) ("How the relevant parcel is defined may alone determine whether the government or the property owner prevails in a takings claim."). The Federal Circuit Court of Appeals has described the relevant parcel issue in this manner:

> If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land for which the use permit is denied, that provides the easiest case for those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial residuary value independent of the . . . regulation, then either a partial or no taking occurred.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1180 (Fed. Cir. 1994).

Given its consequences, the relevant parcel question is perhaps the most critical issue in the modern regulatory takings doctrine. John E. Fee, *Of Parcels and Property,* in *Taking Sides on Takings Issues: Public and Private Perspectives* 101 (Tomas E. Roberts ed. 2002) ("How to define the horizontal boundaries of land for purposes of determining whether there

is a regulatory taking—the very issue dodged in *Palazzolo*—is perhaps the most significant unresolved question"); Richard M. Frank, *Inverse Condemnation Litigation in the 1990's—The Uncertain Legacy of The Supreme Court's* Lucas and Yee *Decisions*, 43 Wash. U. J. Urb. & Contemp. L. 85, 103-04 (1993) ("The 'denominator' issue promises to be one of the next 'hot spots' in regulatory takings law" because "to a considerable degree, the answer to this question dictates whether a taking has occurred."); David C. Buck, Note, *"Property" in the Fifth Amendment: A Quest for Common Ground in the Maze of Regulatory Takings*, 46 Vand. L. Rev. 1283, 1287 (1993) ("Without a clear definition of the relevant property, the diminution in value test will continue to produce an obfuscation of contradictory results.").

B. The Critical Issue of the Relevant Land Parcel Remains Unresolved

This Court has long been aware of the relevant parcel problem, "yet it has taken no steps to remedy the situation." Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 705 (1996). Occasionally, the Court has observed that the focus should be the "parcel as a whole." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *see also*, *Keystone*, 480 U.S. at 497 (quoting *Penn Central*, 438 U.S. at 130-31 ("[T]his Court focuses . . . on the nature of the interference with rights in the parcel as a whole.")). But standing alone, this "whole parcel" principle; i.e., the principle that a "single parcel" should be viewed "as a whole" rather than divided, provides little to guide the relevant parcel inquiry in particular circumstances. It simply begs the question of what constitutes the "single" parcel which a court is not to divide.

There is as yet no federal framework or test for answering this question. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi L. Rev.

1535, 1542 (1994) ("[T]he Court has not articulated a method for defining the 'parcel as a whole.' "). Lisker, *supra* at 705 ("[T]he Court has not provided any type of formula for determining what constitutes the 'parcel as a whole.' "). In some takings cases, the Court has chosen to aggregate property interests to find the relevant "whole" parcel. *See, e.g., Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (entire useful life of property considered relevant temporal parcel); *Keystone*, 480 U.S. at 497-500 (relevant parcel includes mineral and surface property interests); *Penn Central*, 438 U.S. at 138 (relevant parcel comprises air rights and rights in existing structures). But in other contexts, the Court has clearly isolated a discrete property interest. *See Pennsylvania Coal*, 260 U.S. at 414 ("certain coal" out of larger holdings held by plaintiff viewed as relevant parcel); *see generally Coast Range Conifers, LLC v. State of Oregon*, 76 P.3d 1148, 1156 (Or. App. 2003) ("the United States Supreme Court has rather exasperatingly wandered back and forth and back again" on the relevant parcel issue) (citations omitted).

This Court's decisions do not provide standards for determining which contexts call for aggregation of property and which call for isolation. Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9, 16 (1997) ("The Supreme Court's views on this [property segmentation] issue are conflicting and no principled basis for determining the segmentation of property interests has emerged."). And none of the Court's decisions have involved the common scenario where a takings claimant challenges a regulation that burdens land contiguous to another area held in common ownership. *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) ("The Court has never squarely addressed the question of how courts should define the relevant geographic parcel of land."). In such a scenario, the

relevant parcel could be either the burdened land, all of the contiguously owned property, or something in between. But, since there is no method for defining the "whole" parcel, and no case factually on point, there is currently no way to know which parcel is the relevant one for takings analysis. There is, in short, no way to predict whether the challenged regulation causes an economic impact severe enough that it might be considered a taking.

This Court has acknowledged the deep gap in its regulatory takings doctrine left by the outstanding relevant land parcel issue. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court confessed that "the rhetorical force of our 'deprivation of all economically feasible use' [takings] rule is greater than its precision, since the rule *does not make clear the 'property interest' against which the loss of value is to be measured.*" *Id.* at 1016 n.7 (emphasis added). The Court elaborated:

> When for example a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id. (emphasis added).

Though frustrated by this uncertainty, the *Lucas* Court felt compelled to "avoid" the "difficult" issue because the regulation in *Lucas* had taken all value from *both* of Lucas' lots. Since the economic impact on the lots was the same whether one looked at them as a single unit or as distinct units, the relevant parcel question was not properly presented. *Id.*

The issue has not gone away. In the 2001 *Palazzolo* case, the Court was again asked to examine what it called the "difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo*, 533 U.S. at 631. Yet, while the *Palazzolo* Court expressed "discomfort" with the notion that the undefined "whole parcel" principle is the only guidance on the relevant land parcel question, it again declined to address the issue, this time because it was not properly raised below. *See id.*

No procedural barriers or findings prevent resolution of the relevant land parcel issue in this case. The court below explicitly addressed and rejected a claim that the Emmermans' legally and economically independent residential lot is also a constitutionally independent parcel. The Illinois court held that an ordinance combined the lot with a contiguous lot to form a "unitary" parcel for takings analysis. While recognizing that this Court has not yet resolved the relevant land parcel issue, the lower court nevertheless relied in part on the undefined "whole parcel" principle. This case therefore squarely presents a pressing issue of federal takings law that this Court has repeatedly indicated a desire to address, but which has so far escaped review. *See* Fee, *Of Parcels and Property*, *supra* at 102 (noting that question of "horizontal boundaries of land for purposes of determining whether there is a regulatory taking—the very issue dodged in *Palazzolo*—is perhaps the most significant unresolved question").

This Court should take this case to resolve the relevant parcel problem in the context of contiguous land. The integrity of the modern regulatory takings doctrine depends on the Court providing some standards for addressing this persisting issue. *See* Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1375 (1993) ("Any theory of regulatory takings that openly confesses its inability to come to grips with that issue [of how to identify the relevant property interest] is dead before it

is born."); Fee, *Of Parcels and Property*, *supra* at 102 ("Until there is a consensus on how to define the relevant bundle of property, the regulatory taking doctrine will remain a muddle.").

II

FEDERAL AND STATE COURTS ARE IN CONFLICT OVER WHETHER THE GOVERNMENT MAY AGGREGATE A LEGALLY DISTINCT AND SEPARATELY DEVELOPABLE AREA OF LAND, WHOSE USES IT HAS RESTRICTED, WITH ANOTHER CONTIGUOUS AREA TO AVOID THE DUTY TO COMPENSATE FOR A CATEGORICAL REGULATORY TAKING

Since this Court made clear that regulatory takings hinge on the diminution in value of the regulated land, federal and state courts have struggled to answer the antecedent question: how does a court identify the land parcel subject to the test? *See* Frank, *Inverse Condemnation Litigation in the 1990's*, *supra* at 103 ("Federal and state courts are hopelessly split on the denominator issue."); Dwight H. Merriem, *Rules for the Relevant Parcel*, *supra* at 385 ("The debate on [the] relevant parcel has been . . . volatile, or at least uneven, in the lower federal and state courts, and there are some inconsistencies based on the type of real property interest at stake.").

The lower courts, both federal and state, are in particular confusion and conflict over whether the government can aggregate a legally distinct area of land that has been subjected to severe use restrictions with another contiguous area so as to preclude a categorical taking. In allowing the City to avoid takings liability by applying an ordinance that aggregated the Emmermans' developmentally independent legal lot of record with a contiguous lot, the decision below highlights the conflict

among the lower courts on this critical relevant land parcel issue.

A. The Conflict in the Federal Courts

1. The Federal Circuit Has Rejected the Government's Attempts to Aggregate a Legally Distinct and Separately Developable Area of Land with a Contiguous Area of Land

In several cases, the Federal Circuit Court of Appeals has held that the government cannot avoid categorical takings liability by aggregating a legally independent area of land it has severely restricted with a contiguous area. *See Loveladies Harbor, Inc.* 28 F.3d 1171; *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed Cir. 2000).

In *Loveladies Harbor, Inc.*, the property owner purchased 250 acres of wetlands in 1958 with the intent to fill and develop the land as a residential subdivision. *Loveladies Harbor*, 28 F.3d at 1174. 199 acres were so developed and sold. *Id.* But the enactment of state and federal wetlands regulations stalled the development of the remaining 51 acres. *Id.* In return for imposition of a conservation easement upon 38.5 acres of this area, the State of New Jersey eventually agreed to allow development of 12.5 acres. *Id.* n.6. But the federal government refused to issue the federal permit necessary to develop the 12.5-acre parcel, and the landowner sued for just compensation. *Id.*

In arguing that the denial of a permit for the 12.5-acre area did not cause a taking, the government urged the Federal Circuit Court to view the entire original 250-acre area as the relevant parcel. *Id.* at 1180. But the court refused, holding that the government could not aggregate the 12.5-acre area for which the permit was denied with either (1) the 199 acres that was already sold and in different ownership or (2) the 38.5 acres of

land that was burdened by a conservation easement in favor of the state. *Id.* at 1181. In short, the government was barred from aggregating the 12.5 acres for which it had denied a development permit with other contiguous areas of legally distinct land that could be (and to a large extent had been) put to economic use independent of the 12.5 acres.

The Federal Circuit reinforced its resistence to governmental aggregation of legally distinct and separately developable areas of land in *Palm Beach Isles Associates*. In that case, a company purchased 311.7 acres of contiguous property in 1956, profitably sold 261 acres in 1968, and later sought a federal permit to fill and develop the remaining 50.7 acres. *Palm Beach Isles Associates*, 208 F.3d at 1377. The 50.7-acre area consisted of 49.3 acres of submerged wetlands and 1.4 acres of uplands. *Id.*

After denying a permit to develop the 50.7-acre parcel, the government defended against the owner's takings claim by arguing that the original 311.7-acre parcel was the relevant parcel. *Id.* at 1380. As in *Loveladies Harbor*, the court rejected this attempt at aggregation. It held that the government could not aggregate the legally distinct and independently usable 50.7-acre area with the similarly independent 261-acre area. *Id.* at 1381.

On rehearing, the court split the parcel further when faced with the government's late claim that it had regulated the 50.7-acre area pursuant to a federal navigational servitude. *See Palm Beach Isles Associates v. United States*, 231 F.3d 1354,1364. (Fed. Cir. 2000). Because 1.4 acres of this area was already filled and nonnavigable, and so, legally distinct from the submerged 49.3-acre area, the court treated the 1.4-acre area as a separate takings parcel. *Id.*

2. The D.C. Circuit Has Held That the Government May Aggregate a Legally and Developmentally Independent Area with Contiguous Land to Avoid a Categorical Taking

In conflict with the decisions of the Federal Circuit, the D.C. Circuit Court of Appeals has allowed the government to evade takings liability by aggregating a legally distinct and separately developable area of land, whose uses have been severely restricted, with a valuable contiguous area. *See District Intown Properties Ltd.*, 198 F.3d 874.

In *District Intown*, a property owner purchased a single parcel of land in 1961. *District Intown Properties*, 198 F.3d at 877. The property contained an existing apartment building and a contiguous, vacant lawn area. *Id.* In 1988, the city approved subdivision of the property into nine distinct residential lots, only one of which contained the apartment building. *Id.* Soon after, all eight lawn lots were designated a historic landmark in response to community pressure. *Id.* at 878. When the city denied building permits for the lawn lots due to their historic status, the landowner sued, alleging that this adverse regulatory decision caused a taking. *Id.*

The D.C. Circuit had to decide whether the relevant takings parcel was the "eight [lawn] lots for which construction permits were denied," as the property owner urged, or the eight lawn lots *and* the contiguous, previously developed apartment lot, as the government urged. *Id.* at 879. The court sided with the government, holding that the restricted lawn lots should be aggregated with the apartment lot for takings analysis, even though the lawn lots were separately platted and independently useful. *Id.* at 880; *id.* at 888 (Williams, J., concurring). In this way, the government defeated the claim that its regulatory decision with respect to the lawn lots caused an economic impact sufficient to cause a categorical taking. *Id.* at 883.

In this case, the lower court faced a relevant parcel question similar to the one addressed in the decisions of the Federal and D.C. Circuits: could the city aggregate the Emmermans' restricted legal lot of record, which was capable of independent development, with a contiguously owned lot for purposes of takings analysis? The Illinois court concluded that aggregation for takings analysis was proper because the Emmermans were subject to, and had complied with, an aggregation ordinance that required their contiguous lots to be treated as one unit. Pet. App. A-19. In so doing, the Illinois court relied on the D.C. Circuit's opinion in *District Intown*. Pet. App. A-18.

Thus, the decision below increases the tension between the D.C. Circuit and the Federal Circuit on the critical issue of whether the government can aggregate a legally and economically distinct area of land, which it has restricted, with a contiguous area, so as to defeat a categorical taking. This Court should grant the writ to resolve the conflict in the federal courts.

B. The State Court Conflict

1. State Courts Are Also in Confusion Over Whether a Legally Distinct and Separately Developable Area of Regulated Land Should Be Aggregated with a Contiguous Area for Takings Analysis

Like their federal counterparts, state appellate courts are in conflict about whether the government can aggregate a legally and economically independent area of land with a contiguous area so as to defeat a takings claim. State courts in California, Washington, and Ohio have refused to allow the government to use aggregation to defeat takings claims. *See, e.g., Twaine Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 88 (1990) (area subject to challenged zoning decision will be treated separately for takings analysis unless

shown to be not capable of independent economially viable use); *Fifth Avenue Corp. v. Washington County*, 581 P.2d 50, 60 (Or. 1978) (dividing property into different parcels based on scope of regulation); *see also*, *State ex rel. R.T.G., Inc. v. State of Ohio*, 780 N.E.2d 998 (Ohio 2002) (excluding contiguous area from relevant parcel because it was not subject to challenged regulation).

Courts in California are especially skeptical of governmental attempts to evade takings claims by combining a restricted, independently developable area land with a contiguous area. In *Twaine Harte Associates, Ltd.*, 217 Cal. App. 3d at 78, for instance, the property owner owned 8.5 contiguous acres of land. The county zoned 6.8 acres to allow development of a shopping center, which was subsequently built. When it appeared that the owner desired to develop the remaining 1.7 acres, the county zoned this area as open space. *Id.* at 78-79. The owner claimed that this zoning decision caused an unconstitutional taking of property. In response, the government argued that there was no taking because the previously developed 6.8-acre area was part of the relevant parcel. *Id.* at 85.

In considering these competing views, the California court of appeal stressed that "the nature of a particular land use regulation has been recognized as potentially creating separate parcels for 'taking' purposes." *Id.* at 85. The court presumed that the government could not aggregate the 1.7- acre area subject to the challenged open space zoning with the previously developed area not subject to this zoning. *Id.* at 87-88. However, the court allowed the government to overcome the presumption of constitutional separateness by showing that "the 1.7 acre plot was not economically viable apart from the larger parcel." *Id.* at 88. *Cf. Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 495-96 (1982) (70-acre area of 110 contiguous acres treated as relevant parcel).

In contrast with their counterparts in California, Washington, and Ohio, state courts in Colorado, Michigan and New Jersey permit the government to combine restricted land with contiguous areas to form a large relevant parcel that precludes a categorical taking. *See Animas Valley Sand & Gravel, Inc. v. Board of Commissioners of the County of La Plata*, 38 P.3d 59 (Colo. 2001); *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich. 1998); *Karam v. State of New Jersey*, 705 A.2d 1221, 1228 (N.J. Ct. App. 1998) (combining riparian lands subject to challenged "special restricted area" regulation with previously developed uplands).

In *Animas Valley Sand & Gravel*, a property owner purchased a 42-acre parcel for the purpose of mining. 38 P.3d at 61-62. The county granted a permit allowing the mining of approximately 8 acres of this 42-acre parcel. *Id.* at 62. Later, the county adopted a new land use plan and, under the plan's authority, designated the unpermitted 33 acres of the owner's land as a no-mining "river corridor" zone. *Id.* When this designation was challenged as a taking, the government tried to aggregate the land designated as a no-mining zone with the smaller area for which it had long ago granted a mining permit. *Id.* at 68-69. The Colorado state court agreed: in its view, the mere fact that the areas were contiguous allowed their aggregation for takings purposes. *Id.*

To similar effect is *K & K Construction*, in which the Supreme Court of Michigan gave the government broad latitude to avoid a categorical taking by combining a legally and economically distinct area of land with similar, contiguous areas. In *K & K Construction*, the landowner owned four legally divided lots totaling 82 acres, three of which were contiguous. 575 N.W.2d at 534. Lot one contained 55 acres, about half of which was wetlands. *Id.* Lot two also contained wetlands, but lot four was wetlands-free. Lots two and four were contiguous to lot one. *Id.* The owner twice applied for a

state permit to fill the wetlands areas on lot one for development purposes and was twice denied. *Id.* The owner then sued in state court, claiming that permit denial had effected a taking. *Id.*

Before the Michigan Supreme Court, the government contended that the relevant parcel was the entire area owned by the property owner. *Id.* at 536. The court allowed the government to aggregate the restricted lot one with the two contiguous lots even though lot one was differently zoned and separately subdivided. *Id.* at 536-37. The court justified aggregation of the legally distinct lots for constitutional purposes on the ground that the owners treated the three lots as one unit for development purposes. *Id.* at 537 n.6 ("[T]he fact that plaintiffs intended to use all three [areas] in a single development plan negates the fact that they were zoned differently.").

2. The Decision Below Deepens the Confusion Among the State Courts

In this case, the lower court adopted an aggregative approach similar to that applied by the Michigan Supreme Court in *K & K Construction*. As in *K & K Construction*, the lower court here allowed the government to aggregate a legally distinct area of land that could independently be put to economic use with another similarly distinct area. Moreover, as in *K & K Construction*, the Illinois appellate court in this case concluded that existing legal lot lines should be ignored as a factor disfavoring aggregation. Pet. App. A-35,36 (O'Malley, J., dissenting). The rationale for doing so recalls the rationale in *K & K Construction*: the property owners' treatment of their parcels as one unit compelled the conclusion that even legally separate parcels should be treated as one constitutional unit. Pet. App. A-19. But, notably, unlike in *K & K Construction*, the property owners' treatment of their parcels in this case was *compelled by an aggregation ordinance*.

In allowing an ordinance to combine the Emmermans' legally distinct lots, the lower court dismissed state decisions that have refused to sanction aggregation of contiguous areas of land. *See generally*, Pet. App. A-34 (O'Malley, J., dissenting) (noting that, in contrast with majority decision, "[c]ourts in several cases [including the Ohio Supreme Court in *R.T.G. Inc.*] have refused to view all of the owner's contiguous land as the relevant parcel"). To resolve the state conflict over whether courts should allow the government to aggregate legally distinct areas of land to avoid a categorical taking, the Court should grant the writ.

III

THE AGGREGATIVE APPROACH ADOPTED BELOW CANNOT BE RECONCILED WITH THE PRINCIPLES OF FAIRNESS AND JUSTICE THAT UNDERLIE THE TAKINGS CLAUSE

Takings law is ultimately concerned with considerations of "fairness and justice," and in particular, with ensuring that landowners don't bear "public burdens" that should be borne by the "public as a whole." *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). These principles are not served by a decision allowing a property aggregation ordinance to combine legally distinct and separately developable areas of land into a "unitary parcel" for purposes of constitutional takings analysis.

A. The Right to Compensation for a Categorical Taking Should Not Hinge on the Number of Contiguous Lots the Claimant Owns

It is fundamental that individuals have equal rights under the Constitution and under the Takings Clause in particular. *See Palazzolo*, 533 U.S. at 630 ("A regulation or common-law

rule cannot be a background principle for some owners but not for others."). Yet, according to the decision below, people owning functionally and physically identical parcels of property have dramatically unequal rights to just compensation depending on whether they happen to own another contiguous parcel.

Like many of the people in their residential subdivision, the Emmermans own a legally subdivided, but undersized lot. Pet. App. A-23. Over time, the City has agreed to the residential development of all of these undersized lots, the Emmermans' vacant lot being the sole exception. Pet. App. A-37 (O'Malley, J., dissenting). These developed lots have proven safe for residential use. If individually owned, it seems clear that each of these lots would be the relevant parcel in a takings claim. Pet. App. A-18 ("*contiguous* lots under the same ownership are to be considered as a whole for purposes of . . . takings analysis") (emphasis added). Therefore, if the owner of a single nonconforming lot was denied all use of the lot, he would have a legitimate claim to compensation for a categorical taking. *See, e.g.*, *Moroney v. Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045, 1050 (N.J. Sup. 1993) (holding that denial of a variance allowing building on noncontiguous undersized residential lot amounted to an unconstitutional taking).

But, under the decision below, the rules are entirely different if the owner of a restricted nonconforming lot happens to be "fortunate" enough to own a contiguous lot. In this scenario, the City's aggregation ordinance requires the owner to treat an economically idled lot as an appendage of the contiguous lot. The result, according to the court below, is a "unitary parcel" for takings analysis. Pet. App. A-19. If the unified parcel includes valuable development, the owner has no claim for a categorical taking; meanwhile, the neighboring owner of a single identical lot does.

In sum, under the decision below, the City's duty to compensate for a categorical taking depends not on the nature and economic impact of the challenged restriction, but upon whether one owns contiguous lots. In this case, the Emmermans own a lot that is identical to the many developed lots in their neighborhood. Yet, they do not enjoy the same development opportunities, or right to compensation for loss of those opportunities, simply because they also own a contiguous lot.

This Court should grant the writ to affirm that the Constitution protects individuals, not tracts of land, and therefore that individuals owning legally and economically identical tracts of land have the identical right to just compensation when they are deprived of all economic use of those tracts.

B. Fairness Disfavors Automatic Aggregation of Contiguous Lots When the Lots Are Legally Distinct and Capable of Independent Development

Courts that allow aggregation of a restricted area of land with a contiguous area to create the relevant parcel typically do so out of concern that the landowner is trying to "conceptually sever" a single legal unit of property. This concern arises most often in cases where a landowner applies to use a legally defined area of land, is told that regulations allow use of only a portion of that area, and then claims that the restricted portion is the relevant takings parcel. *See, e.g., Jentgen v. United States*, 657 F.2d 1210, 1214 (Fed. Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) (refusing to segregate 60 out of 80 acres as relevant parcel when government denied fill application for 60-acre area but allowed fill of 20 other acres). Fairness could disfavor the landowner's position in such situations if it appears that the owner is trying to artificially engineer a categorical takings claim.

Fairness concerns cut the other way, however, when the landowner applies to use a specific, legally distinct area of land, the government denies the use, and later tries to aggregate the restricted area with a contiguous area. In this situation, the landowners are not trying to "conceptually sever" an area that was previously a legal whole; they are trying to prevent the government from "conceptually aggregating" areas that are legally distinct. *Cf.* R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 Sw. U. L. Rev. 1019, 1067 n.284 (1992). In this situation, fairness supports the landowners' narrower definition of the relevant parcel because it appears that the government is trying to engineer a taking without compensation.

In this case, the Emmermans' vacant lot is legally distinct. Pet. App. A-35 (O'Malley, J., dissenting) ("The City's zoning ordinances attach definite legal consequences to lot lines."). Because nonconforming lots of the same size or smaller than the vacant lot have been residentially developed, the vacant lot is also capable of economically viable use standing alone. Pet. App. A-36-37 (O'Malley, J., dissenting) (describing proliferation of development on lots of same size as Emmermans' restricted lot). Indeed, if not for the City's property aggregation ordinance, there is little doubt that the Emmermans' vacant lot would be considered an independently developable lot.

In these circumstances, there is little risk that viewing the Emmermans' vacant lot independently for takings analysis amounts to "conceptual severance" bestowing a windfall of compensation. On the contrary, given its legal independence and developable qualities, there is a great risk that *not segregating* the lot amounts to "conceptual aggregation" bestowing a windfall of property on the City. As the dissenting justice below in this case explained:

> Plaintiffs are not seeking this court's complicity in some devious "gerrymandering" of property divisions; we are not called upon to give legal significance to imaginary lines so as to artificially enhance the economic harm to the [vacant] Sherwood lot.

Pet. App. A-32 (O'Malley, J., dissenting).

> If any party in this case is overreaching, it is the City, for in urging an inclusive definition of plaintiffs' property that disregards internal lot divisions it is downplaying the significance of the very lot line to which its zoning ordinances ascribe importance.

Pet. App. A-35-36 (O'Malley, J., dissenting).

In allowing the City's property aggregation to combine the Emmermans' legally distinct lots into a "unitary parcel," the court below violated the principles of equity that drive the relevant parcel inquiry and all of takings analysis. Indeed, because the court's infraction allowed the City to impose an open space servitude on the Emmermans' vacant lot without paying for it, for the benefit of the community, the decision below has forced the Emmermans to "alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (quoting *Armstrong v. United States*, 364 U.S. at 49).

This Court should grant the writ to clarify that considerations of fairness and justice prevent the government from obtaining private property by improper aggregation of land just as surely as they prevent the landowner from obtaining compensation by improper conceptual severance.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: August, 2004.

Respectfully submitted,

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Appendix A1

No. 2-02-1012.

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LaSALLE NATIONAL BANK, as Trustee of Trust No. B8000213124, Esther P. Emmerman and Ronald Z. Emmerman,	)	Filed Sept. 29, 2003.
Plaintiffs-Appellants,	)	As Modified Upon Denial of Rehearing Oct. 31, 2003.
v.	)	
The CITY OF HIGHLAND PARK; The Zoning Board of Appeals of the City of Highland Park; Steven M. Levin, Chair, Zoning Board of Appeals of the City of Highland Park; Richard Becker, Cary Glenner, Marc S. Lichtman, Stephen Sickle, Elliott Wiczer, Richard A. Wolfe, Members, Zoning Board of Appeals of the City of Highland Park; Peter Waldock, Director, Highland Park Department of Community Development; Stephanie Sodke, Department of Community Development, City of Highland Park; Larry King, Forester, City of Highland Park; Howard and Rebecca Grill; Amy and Brian Herzog; Bruce Friedman; Herbert Goldberg; Philippe and Debbie Cochran; Neal Mall; Barbara and Joseph Esdale; Audrey Weinberg; Debbie and Jeffrey	)	

Elias; Mario Jedwabnik; Gail Brenner)
Laura and Andrew Cohen; Marvin)
Marder; Robin Steinberg; Stuart and)
Rosalie Edelstein; Joan Friedman; Ned)
Zallik; Stephan and Sandra Saltzman;)
Sandy Grossman; Scott and Lisa)
Golant; Mark Shanberg; Robert and)
Robin Berenson; Marla Skolnik; Cindy)
Zallik; Paula Debofsky; Marcie and)
Howard Wender; Lyla Marder; Mark)
Debofsky; Daniel Weinberg; and Sari)
Goldberg,)
)
Defendants-Appellees.)
)

Property owners sought judicial review of a decision by city's zoning board of appeals that denied variance for construction of single-family home, and challenged constitutionality of zoning regulation. The Circuit Court, Lake County, Barbara Gilleran Johnson, J., affirmed denial of variance and dismissed constitutional claims. Owners appealed. The Appellate Court, Byrne, J., held that: (1) owners were not entitled to separate lots and to build on vacant lot; (2) they failed to state takings claim; and (3) they failed to state equal protection claim.

Affirmed.
O'Malley, J., dissented and filed opinion.

* * * *

Susan Marie Connor, Chicago, for Esther P. Emmerman, Ronald Z. Emmerman, LaSalle National Bank. Steven M. Elrod, Robert C. Newman, Elliot M. Regenstein, Holland &

Knight, LLP, Chicago, for City of Highland Park, Zoning Board of the City of Highland Park.

MODIFIED UPON DENIAL OF REHEARING

Justice BYRNE delivered the opinion of the court:

Plaintiffs, LaSalle National Bank, as trustee of trust No. B8000213124, and Esther P. and Ronald Z. Emmerman, appeal the judgment of the circuit court of Lake County in dismissing their four-count complaint against defendants, the City of Highland Park (City), and the Zoning Board of Appeals of the City of Highland Park (Board), et al. We affirm.

FACTS

In 1968, plaintiffs Esther P. and Ronald Z. Emmerman purchased two lots at 1635 Eastwood Avenue and 1634 Sherwood Avenue in Highland Park. The property consists of two separately platted, contiguous zoned lots, each consisting of 15,415 square feet in area. At the time plaintiffs purchased the property, a single-family home was constructed on the Eastwood lot and the Sherwood lot was vacant. Also at that time, the minimum lot size for all lots in plaintiffs' zoning district was 40,000 square feet. Before plaintiffs purchased the property, the City's zoning ordinance did not permit, and it continues to deny permission for, the separation of contiguous undersized lots that are held under the same ownership. Section 150.104(A) of the Highland Park Zoning Ordinance of 1997 provides, in relevant part:

> When two or more parcels of land (which may contain a lot or lots of record), are adjacent and one or more of such parcels lack adequate area or width to qualify for a permitted use under the requirements of the zoning district in which such parcels are located, all of

> such parcels shall be maintained and used as one zoning lot for such use if such parcels have been held in contiguous ownership at any time after May 8, 1960 * * *.

Highland Park Zoning Ordinance § 150.104(A) (1997).

The provision effectively prevented the building of a single-family home on the Sherwood property.

After plaintiffs acquired the property, the City reduced the minimum lot size zoning requirements for plaintiffs' zoning district to 12,000 square feet. During this time, the City permitted the subdivision of land two lots to the north of plaintiffs' property. These lots are approximately 12,000 square feet and the City granted permission for single-family homes to be built on each lot. However, in April 1970, the City increased the minimum lot size zoning requirements for plaintiffs' zoning district to 20,000 square feet. This lot size restriction has remained to this day.

It is undisputed that the entire parcel is located in zoning classification district R-4, a different district from the lots across the street from the Sherwood lot to the east, which are zoned R-6. The R-4 zoning district contemplates much larger lot sizes and open park land than the R-5 and R-6 zoning districts that surround the R-4 district.

On March 29, 2001, plaintiffs filed a petition requesting a variance to permit the separation of the two lots held in common ownership to allow the development of a single-family home on the Sherwood lot. Following a hearing, the Board found that the openness created by the R-4 district serves a public purpose and should be preserved. The Board also found that plaintiffs did not meet their burden of proving each of the

necessary elements required to obtain a variance and voted to deny the petition.

Plaintiffs filed a four-count complaint for administrative review and injunctive relief. The first count seeks judicial review of the Board's decision to deny the variance, and the remaining counts challenge the City's zoning regulation on constitutional grounds. Specifically, in counts II, III, and IV, respectively, plaintiffs claim that the City's zoning regulation, which prohibits plaintiffs from separating the lots and building a single-family home on the Sherwood lot, is unlawful and unconstitutional under the "takings" clause and the equal protection clause of the state and federal constitutions.

The circuit court found that the Board's decision in denying the variance was not against the manifest weight of the evidence and affirmed the order of the Board as to count I of plaintiffs' complaint for administrative review. The circuit court also granted the City's motion to dismiss counts II, III, and IV of plaintiffs' complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2000)). Plaintiffs timely appeal.

ANALYSIS

1. Administrative Review Claim

Plaintiffs first contend that the Board erred in failing to grant them a variance to build a single-family home on the Sherwood lot. Before turning to the merits of plaintiffs' contention, we first review the applicable standards regarding the review of a decision made by a local zoning board. Under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2000)), we review the final decision of the administrative agency and not the decision of the circuit court. *Hercules, Inc. v. Department of Revenue*, 324 Ill. App.3d 329, 335, 257 Ill.

Dec. 223, 753 N.E.2d 418 (2001). We consider all questions of law and fact presented by the record (735 ILCS 5/3-110 (West 2000)), and the standard of review applied by this court turns on the proper characterization of questions presented. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204, 229 Ill. Dec. 522, 692 N.E.2d 295 (1998).

Deference is afforded the agency's findings of fact and they will not be disturbed unless against the manifest weight of the evidence. *City of Belvidere*, 181 Ill. 2d at 204, 229 Ill. Dec. 522, 692 N.E.2d 295. Unless we are able to conclude that the agency's findings of fact are against the manifest weight of the evidence, we must accept those findings as *prima facie* true and correct. 735 ILCS 5/3-110 (West 2000); *North Avenue Properties, L.L.C. v. Zoning Board of Appeals*, 312 Ill. App. 3d 182, 185, 244 Ill. Dec. 469, 726 N.E.2d 65 (2000). Agency determinations involving mixed questions of fact and law are also provided a degree of deference and are reviewed pursuant to a clearly erroneous standard. *City of Belvidere*, 181 Ill. 2d at 205, 229 Ill. Dec. 522, 692 N.E.2d 295. Determinations of law, conversely, are not afforded deference and are reviewed on a *de novo* basis. *City of Belvidere*, 181 Ill. 2d at 205, 229 Ill. Dec. 522, 692 N.E.2d 295.

The party seeking the variance must present affirmative evidence to prove each of the necessary elements required to obtain a variance, even in the absence of opposition. *Weinstein v. Zoning Board of Appeals*, 312 Ill.App.3d 460, 464, 245 Ill.Dec. 208, 727 N.E.2d 655 (2000). Because plaintiffs must prove each of the elements required to obtain a variance, if the manifest weight of the evidence shows that plaintiffs failed to prove any one of the necessary elements, we must affirm the board's decision.

Plaintiffs contend that they proved all of the elements necessary to satisfy the standards for a variance, including that

they could not make a reasonable return on their investment absent a variance. We disagree.

Section 150.104(A) provides that the Board must evaluate all variance requests under the factors set forth in section 150.1205 of the Highland Park Zoning Ordinance, and, further, that no request for a variance regarding lots held contiguously per section 150.104(A) shall be granted unless additional criteria are met. Section 150.1205(A)(1) provides, in pertinent part, that the Board shall not grant a variance unless, based on the evidence presented at the hearing, it finds:

> (1) [t]he property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations of the zoning district in which it is located; however, the purpose of the variation is not based exclusively upon a desire to make more money from the property.

Highland Park Zoning Ordinance § 150.1205(A)(1) (1997).

Plaintiffs contended at the hearing, and now on appeal, that they would lose money if they were not allowed to separate the two lots and to develop a single-family home on the Sherwood lot. Plaintiffs asserted, in their testimony at the hearing, that of the $45,000 purchase price for the two lots, they intended to apportion a value of $20,000 to the Sherwood lot, and they cannot make a reasonable return on that investment unless a variance is granted to allow them to build on the Sherwood lot. Plaintiffs base their argument on the assumption that the Board was required as a matter of law to treat the Sherwood lot as a separate investment.

In *Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App. 3d 863, 187 Ill. Dec. 506, 617 N.E.2d 1227 (1993), we chose to view the plaintiff's property not as three distinct segments, as

the plaintiff in that case wanted us to; rather, we chose to view the subject lots together as an entire parcel, as this was supported by the well-pleaded facts that the entire parcel was purchased as a single unit at one time. We concluded as a matter of law that the allegations of the plaintiff's complaint failed to allege any substantial deprivation of an economically viable use, thus defeating its claim. *Tim Thompson*, 247 Ill. App. 3d at 888, 187 Ill. Dec. 506, 617 N.E.2d 1227.

In this case, the evidence reveals that the Eastwood and Sherwood lots were purchased in a single transaction for a single price. Similar to *Tim Thompson*, because the lots were purchased together, the Board could likewise legally treat them as a single parcel for purposes of determining economic expectations. The claim that Ronald apportioned $20,000 of the purchase price for the vacant lot and that his testimony was uncontroverted is an issue of credibility and weight, which we may not review. *See Weinstein*, 312 Ill. App. 3d at 466, 245 Ill. Dec. 208, 727 N.E.2d 655.

Moreover, the record demonstrates that plaintiffs have received a reasonable return on their entire parcel. Here, the evidence shows that plaintiffs purchased the Eastwood and Sherwood lots in a single transaction in 1968 for the single price of $45,000. Plaintiffs admitted that they could sell the entire parcel and house today for somewhere between $800,000 and $1 million. The evidence further reveals that Ronald twice declined to answer the question of what return plaintiffs expected from their original $45,000 investment. Plaintiffs also testified at the hearing that they had made improvements to their home, but they did not present any supporting documents showing the value of the specific improvements, and Ronald stated that he never looked at his house as an investment or anticipated a return on his investment. No evidence was presented regarding what kind of return other houses in the area enjoyed over the same time period. Given the lack of evidence

presented, the Board properly found that plaintiffs failed to carry their burden of demonstrating that they could not receive a reasonable return on the property without a variance allowing a second house to be built.

Furthermore, the evidence reveals that plaintiffs knew that the sale and construction of a home on the Sherwood lot were legally prohibited when they bought the property in 1968, and the Board concluded that this was not a reasonable investment expectation. Plaintiffs assert on appeal that the Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), has rendered irrelevant the fact that plaintiffs knew that they could not build on the vacant property when they bought it, and therefore, plaintiffs assert that the Board could not properly consider this as an impediment to their right to the reasonable economically viable use of their property. We disagree.

In *Palazzolo*, the lower court held that the purchaser had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property. The Supreme Court rejected the lower court's holding that the purchaser was deemed to have notice of an earlier-enacted restriction and therefore was barred from claiming that it effected a taking. *Palazzolo*, 533 U.S. at 626-28, 121 S. Ct. at 2462, 150 L. Ed. 2d at 613. However, the Supreme Court held that such knowledge was not, *ipso facto*, an absolute bar. The Court believed that it

> would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the

> claim ripe were not taken, or could not have been taken, by a previous owner.

Palazzolo, 533 U.S. at 628, 121 S. Ct. at 2463, 150 L. Ed. 2d at 614; *see Burke v. Village of Glenview*, 257 Ill. App. 3d 63, 70, 195 Ill. Dec. 1, 628 N.E.2d 465 (1993) ("[t]he purchaser's knowledge of the zoning restriction * * * [i]s not an absolute bar to a zoning challenge").

Thus, while knowledge of a regulation at the time of ownership is not an absolute bar to a zoning challenge, it is proper to consider that the zoning restriction existed at the time of the plaintiff's acquisition in determining whether the plaintiff's investment-backed expectations have been met.

> Purchasers who acquire property with the expectation of using it for a purpose not permissible under current zoning restrictions should not expect loss resulting from denial of the proposed use to be a persuasive argument in securing the change.

Lapkus Builders, Inc. v. City of Chicago, 30 Ill. 2d 304, 310, 196 N.E.2d 682 (1964); *National Advertising Co. v. Village of Downers Grove*, 204 Ill. App. 3d 499, 512, 149 Ill. Dec. 604, 561 N.E.2d 1300 (1990). Accordingly, we reject plaintiffs' argument. *See Palazzolo*, 533 U.S. at 634-36, 121 S. Ct. at 2466-67, 150 L. Ed. 2d at 618-19 (O'Connor, J., concurring).

Plaintiffs next argue that the contiguous ownership provision is invalid as applied to them because it constitutes a denial of reasonable economic use in the context of a neighborhood that has been largely developed under less stringent restrictions when only a very few remaining landowners would be subject to the more restrictive regulations. Plaintiffs first cite *Gibson v. Village of Wilmette*, 97 Ill. App. 3d 1033, 54 Ill. Dec. 569, 425 N.E.2d 434 (1981),

and *Welch v. City of Evanston*, 65 Ill. App. 3d 249, 22 Ill. Dec. 295, 382 N.E.2d 615 (1978), as being "virtually identical" to their case. We find these cases directly contrary to the facts here.

Both decisions concern the issue of whether a lot is buildable, but they are distinguishable because the property owners in each case purchased the land before the zoning ordinance that precluded construction was passed. In *Gibson*, before the plaintiffs purchased two lots in 1972, they asked the village whether the vacant lot was buildable and received both oral and written assurances that it was. However, under an ordinance passed in 1975, the property was not buildable. *Gibson*, 97 Ill. App. 3d at 1034, 54 Ill. Dec. 569, 425 N.E.2d 434. Similarly, in *Welch*, at the time two lots were purchased in 1954, the zoning laws would have permitted the construction of a single-family home. After the adoption of 1960 zoning amendments, only if the two lots were combined would there be sufficient square footage to allow the construction of one home. *Welch*, 65 Ill. App. 3d at 250, 22 Ill. Dec. 295, 382 N.E.2d 615. Here, unlike in *Gibson* and *Welch*, plaintiffs conceded that, when they purchased the lots in 1968, they knew that the zoning restriction was applicable to the contiguous lots. *See La Grange State Bank v. Village of Glen Ellyn*, 227 Ill. App. 3d 308, 318, 169 Ill. Dec. 307, 591 N.E.2d 480 (1992).

After reviewing the record, we find that the Board's determination that plaintiffs' evidence fails to demonstrate that the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations was not against the manifest weight of the evidence. Accordingly, we must affirm the decision of the Board.

We note that, although it is unnecessary to address this element, the evidence also supports the Board's decision that plaintiffs failed to satisfy section 150.1205(A)(8). To satisfy

section 150.1205(A)(8), plaintiffs were required to show that "[t]he proposed variation is in harmony with the spirit and intent of this Chapter." Highland Park Zoning Ordinance § 150.1205(A)(8) (1997). As plaintiffs acknowledge, the general purposes of the zoning ordinances are to promote the public health (section 150.101(B)(1)), to conserve the value of land and enhance the desirability of living in the community (section 150.101(B)(7)), to regulate the intensity of the use of lot areas and conserve open space (section 150.101(B)(8)), and to prevent overcrowding (section 150.101(B)(8)(b)). In the Board's view, the purpose of zoning plaintiffs' area R-4 was to ensure that homes in the neighborhood are constructed on lots of 20,000 square feet or more. The Board believed that, because the R-4 zoning district within which the property is located is surrounded by smaller, more densely built lots with R-5 and R-6 zoning, the R-4 district provided a desirable area of greater open space and park land. The Board pointed out that there was no evidence in the record that a variance had ever been granted within this R-4 zoning district to permit construction of a house on a lot as small as that on which plaintiffs' application was based. The Board concluded that plaintiffs failed to meet the requirement of this section because the variance was not in harmony either with the contiguous owner provision or with the zoning district in which plaintiffs were located. The Board's determination is supported by the evidence.

2. Constitutional Claims

Plaintiffs next contend that the trial court erred in dismissing counts II through IV, which were dismissed pursuant to section 2-615. A section 2-615 motion to dismiss presents a question of law, which is reviewed de novo. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147-48, 267 Ill. Dec. 14, 776 N.E.2d 151 (2002). In reviewing a motion to dismiss under section 2-615, we accept as true all well-pleaded facts and reasonable

inferences therefrom. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 44, 258 Ill. Dec. 79, 755 N.E.2d 462 (2001). We determine whether plaintiffs assert a cause of action upon which relief may be granted after considering all allegations in a light most favorable to plaintiffs. *Jackson*, 197 Ill. 2d at 45, 258 Ill. Dec. 79, 755 N.E.2d 462.

Plaintiffs contend that the trial court erred in dismissing counts II and III of their complaint for failure to state a legally cognizable cause of action for "taking" their property without just compensation in violation of both the United States and Illinois Constitutions. In the state context, a land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. *Northern Illinois Home Builders Ass'n v. County of Du Page*, 165 Ill. 2d 25, 32, 208 Ill. Dec. 328, 649 N.E.2d 384 (1995). Moreover, where an ordinance is an otherwise valid exercise of a municipality's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. *Goldblatt v. Town Of Hempstead*, 369 U.S. 590, 592, 82 S. Ct. 987, 989, 8 L. Ed. 2d 130, 133 (1962). In the federal context, where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex set of factors, including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 648 (1978).

In counts II and III, plaintiffs allege that they were deprived of all economically viable use of the vacant property that they sought to have separated by the variance. Similar to the argument made by the Board under the administrative review

claim above, the City responds that plaintiffs' argument continues to proceed on the assumption that we should analyze their takings claim solely on the basis of the Sherwood lot. The City contends that, for takings purposes, both of plaintiffs' lots must be treated as a unitary parcel, not as two separate lots. The City claims that, when evaluating a takings claim, we must first define the relevant parcel, the determination of which is a question of law. We agree; as the definition of the relevant parcel influenced the outcome of the administrative claim, it also profoundly influences the outcome of the takings analysis here. Accordingly, we first define what constitutes the relevant parcel before the regulation's effect can be evaluated.

In several land use cases, Illinois courts have determined the question of whether several lots constitute one parcel for purposes of ascertaining economic viability as a question of law. *See Department of Transportation v. Chicago Title & Trust Co.*, 303 Ill. App. 3d 484, 495, 236 Ill. Dec. 510, 707 N.E.2d 637 (1999) ("The question of whether certain parcels of land constitute one parcel for purposes of ascertaining remainder damages in an eminent domain action is a question of law"); *Tim Thompson*, 247 Ill. App. 3d at 887-89, 187 Ill. Dec. 506, 617 N.E.2d 1227; *Department of Conservation v. Franzen*, 43 Ill. App. 3d 374, 378, 1 Ill. Dec. 912, 356 N.E.2d 1245 (1976). As we found *Tim Thompson* relevant to our determination under the administrative claim, we also find it instructive here. Thompson had purchased three contiguous lots in a subdivision. Two months after the lots were purchased, the Village of Hinsdale rezoned the subdivision so that only two of the lots retained the minimum lot size required for building a single-family home. Thompson argued that the rezoning of the subject lots denied it economically viable use of lots 6 and 7. Thereafter, Thompson filed a complaint alleging, inter alia, an action for inverse condemnation against Hinsdale, which was dismissed for failing to state a cause of action. Thompson argued on appeal that the trial court erred in dismissing its

complaint because Thompson alleged that Hinsdale significantly interfered with Thompson's investment-backed expectations. Similar to the City here, Hinsdale responded that Thompson's failure to allege deprivation of all economically viable use of the entire subject property defeated its claim for inverse condemnation under the federal constitution.

Reading Thompson's complaint as a whole and accepting its well-pleaded facts as true, we concluded that Thompson had failed to allege any substantial deprivation of an economically viable use. *Tim Thompson*, 247 Ill. App. 3d at 887, 187 Ill. Dec. 506, 617 N.E.2d 1227. While the zoning regulation did not permit Thompson to erect three houses on the three individual lots as originally platted, we reasoned that the regulation did not prevent Thompson from developing the property for an economically viable use, as Thompson remained free to develop the entire parcel, subject only to the newly enacted ordinance. The inference drawn from the facts as alleged was that, as zoned, Thompson was not able to realize as much profit from the development as originally anticipated. Thus,

> rather than alleging a deprivation of economically viable use, Thompson, in our view, ha[d] alleged, at best, nothing more than a diminution in the ultimate value of the entire parcel, i.e., lots 5, 6 and 7 in the aggregate.

Tim Thompson, 247 Ill. App. 3d at 887-88, 187 Ill. Dec. 506, 617 N.E.2d 1227.

We noted that, in the seminal case of *Penn Central*, 438 U.S. at 130-31, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652, the Supreme Court stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *."

We also pointed out that in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), in response to the petitioners' argument that an aspect of a mining subsidence ordinance, which deprived the petitioners of the ability to mine certain areas for coal, was tantamount to an appropriation by the state, the Court responded that the argument failed for the same reason explained in *Penn Central*, that the 27 million tons of coal did not constitute a separate segment of property for takings law purposes. *Keystone*, 480 U.S. at 498, 107 S. Ct. at 1248-49, 94 L. Ed. 2d at 496.

Accordingly, "viewing the subject lots together as an entire parcel, which [was] supported by the well-pleaded fact in Thompson's complaint that it purchased the entire parcel as a single unit at one time," we concluded, as a matter of law, that the allegations of Thompson's complaint failed to allege any substantial deprivation of an economically viable use, thus defeating its claim. *Tim Thompson*, 247 Ill. App. 3d at 888, 187 Ill. Dec. 506, 617 N.E.2d 1227. Because the Hinsdale zoning regulation merely denied Thompson its optimally desired use of the property, and the regulation otherwise allowed the landowner an economically viable use of its property, a regulatory taking had not occurred. *Tim Thompson*, 247 Ill. App. 3d at 888-89, 187 Ill. Dec. 506, 617 N.E.2d 1227.

Although *Penn Central* and *Keystone* did not involve contiguous lots under the same ownership, specification of the appropriate unit of property under consideration was at the heart of the decisions, and therefore the principles espoused in those cases offer guidance here. In *Bevan v. Brandon Township*, 438 Mich. 385, 439 Mich. 1202, 475 N.W.2d 37 (1991), the Supreme Court of Michigan also found guidance in *Keystone* and *Penn Central* in determining that the plaintiffs' property should be viewed as a whole rather than as two separate lots for purposes of the taking analysis. In *Bevan*, the plaintiffs owned six acres of undeveloped land that did not front on a public road. Their predecessor in title had divided the parcel into two contiguous lots, each with its own tax description, and the lots were sold separately to the plaintiffs. The only access to the plaintiffs' property was an easement 20 feet wide and 290 feet long across a neighbor's land. Under the township land use ordinance adopted after the plaintiffs acquired title, the land was zoned for single-family homes, and one house could be built on the property. The plaintiffs were restricted from building two or more houses on the property unless access was made available over a road with a right-of-way width of at least 66 feet. It was undisputed that the easement providing the only access to the plaintiffs' property did not meet the minimum width requirement of the ordinance applicable to a private road which served two or more homes. After their application for permits to build two houses on the property was rejected and the variance was denied, the plaintiffs filed suit.

The *Bevan* court noted that "[s]ince for purposes of a taking analysis it is necessary to compare the value 'taken' with the value that remains, 'one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."'" *Bevan*, 438 Mich. at 393, 439 Mich. 1202, 475 N.W.2d at 42, quoting *Keystone*, 480 U.S. at 497, 107 S. Ct. at 1248, 94 L. Ed. 2d at 496. Relying on *Penn Central* and *Keystone*, the court explained that

the taking analysis does not turn on the state's recognition of a separate estate within the owner's property or whether state law allows the separate sale of a segment of the property. As *Keystone* reasoned: "'[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.'" *Keystone*, 480 U.S. at 497, 107 S. Ct. at 1248, 94 L. Ed. 2d at 496, quoting *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S. Ct. 318, 326-27, 62 L. Ed. 2d 210, 223 (1979).

We do not find that recognizing that contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances or for a taking analysis affects or detracts from the reasonableness of the classification. "If it were held to be so, the result would be that it would be competent for landowners to perpetually defeat future zoning restrictions by crisscrossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others." *Korby v. Township of Redford*, 348 Mich. 193, 198, 82 N.W.2d 441, 443 (1957).

We observe at this juncture that the Supreme Court has yet to define the factors used to determine the relevant parcel for takings purposes, which is commonly referred to as the "denominator problem." However, state law has offered some guidance to the federal courts in their determination. *See District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999). For example, in *District Intown Properties*, the court applied such factors as the degree of contiguity, the dates of acquisition, the extent to which the parcel had been treated as a single unit, and the extent to which the restricted lots benefitted the unregulated lot. *District Intown Properties*, 198 F.3d at 880.

Here, plaintiffs' amended complaint indicates that they purchased the Eastwood and Sherwood lots as a single unit at one time. In their complaint, they repeatedly refer to the two lots collectively as the "subject property." The complaint alleges that the two lots had been held in contiguous ownership since plaintiffs bought them in 1968. Plaintiffs also admitted before the Board that they could not have purchased the lots separately because of the zoning ordinance, which was in effect at the time the property was purchased, and that they paid a single price of $45,000 for the entire "subject property."

Taking the allegations as pleaded in their complaint, we choose, as we did in *Tim Thompson*, to view the lots together as an entire parcel. This is supported by the well-pleaded facts in plaintiffs' complaint and their admission before the Board. We find the present case presents an even stronger case than *Tim Thompson* because here plaintiffs acknowledged before the Board that the lot they now assert should be treated separately could not legally have been built upon as a separate lot either at the time they purchased the property or at present. We therefore find, as a matter of law, that the two lots should be treated as a unitary parcel.

Next, given that the lots should be treated as a single parcel, we must next consider whether plaintiffs' claim constituted a takings claim. Because plaintiffs' complaint was dismissed pursuant to a section 2-615 motion, the question before this court is whether their claims set forth a cause of action upon which relief could be granted. Illinois is a fact-pleading state. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518, 136 Ill. Dec. 47, 544 N.E.2d 733 (1989). Accordingly, a pleader is required to set out the ultimate facts that support his or her cause of action, and legal conclusions unsupported by allegations of specific facts are insufficient. *In re Petition for Annexation of Certain Property*

to the Village of Plainfield, Illinois, 267 Ill. App. 3d 313, 317, 204 Ill. Dec. 801, 642 N.E.2d 502 (1994).

As stated above, in Illinois, a land use regulation does not constitute a taking if it substantially advances legitimate state interests and does not deny an owner the economically viable use of his land. *Northern Illinois Home Builders*, 165 Ill. 2d at 32, 208 Ill. Dec. 328, 649 N.E.2d 384. Plaintiffs allege that they were denied the economically viable use of the Sherwood lot. However, viewing the subject lots together as an entire parcel, we conclude that the allegations of their complaint fail to state the necessary facts to support their legal conclusion that they were denied the economically viable use of the vacant property, thus defeating their claim. *See Tim Thompson*, 247 Ill. App. 3d at 888, 187 Ill. Dec. 506, 617 N.E.2d 1227.

Plaintiffs further contend that to determine whether legitimate state interests have been advanced, we must examine the factors for evaluating the constitutionality of zoning regulations set out in *La Salle National Bank of Chicago v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957). The *La Salle* factors have been consistently used to judge the strength of a plaintiff's case in the context of a substantive due process claim, but we have not found any case in which a court has analyzed the *La Salle* factors in the context of a constitutional takings claim. Plaintiffs in this case have not raised a substantive due process challenge to the zoning regulation. However, to the extent that they raise a substantive due process claim in their takings claim, we will briefly discuss the *La Salle* factors here.

We note that the failure of a complaint to plead a cause of action in terms of all the *La Salle* factors may indicate its vulnerability to dismissal; however, dismissal should not occur if the pleading theory otherwise supports a claim of unconstitutional arbitrariness or capriciousness. Ordinarily, the

La Salle factors have been used to judge the strength of a plaintiff's case after a full presentation of evidence at trial. Not all of them can even be meaningfully applied at an earlier stage. *See Rodriguez v. Henderson*, 217 Ill. App. 3d 1024, 1030, 160 Ill. Dec. 878, 578 N.E.2d 57 (1991).

A zoning ordinance is presumed valid, and a successful challenge requires proof, by clear and convincing evidence, that its enactment was arbitrary, capricious, or unrelated to the public health, safety, and morals. *La Salle*, 12 Ill. 2d at 46, 145 N.E.2d 65. If the reasonableness of a zoning ordinance is merely debatable, the courts will not interfere. *Rodriguez*, 217 Ill. App. 3d at 1028, 160 Ill. Dec. 878, 578 N.E.2d 57.

In determining whether a municipal ordinance is valid as applied to plaintiffs' constitutional zoning challenge of the unitary parcel, the following factors must be taken into account: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restriction; (3) the extent to which the destruction of property values promotes the health, safety, morals, or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purpose; (6) the length of time the property has been vacant as zoned considered in the context of the land development in the area in the vicinity of the subject property; (7) the community need for the proposed use; and (8) the care with which the community has undertaken its development plan. *Thornber v. Village of North Barrington*, 321 Ill. App. 3d 318, 326, 254 Ill. Dec. 473, 747 N.E.2d 513 (2001), citing *La Salle*, 12 Ill. 2d at 46-47, 145 N.E.2d 65. Although no one factor is determinative, a primary concern is whether the property in question is zoned in conformity with surrounding uses and whether those uses are uniform and established. *Thornber*, 321 Ill. App.3d at 327, 254 Ill. Dec. 473, 747 N.E.2d 513.

We further point out that our supreme court has instructed that courts must, when deciding whether a land use regulation is valid as applied to a particular property, take into account whether the current owners could have built on the lot when they acquired it, because

> [p]urchasers who acquire property with the expectation of using it for a purpose not permissible under current zoning restrictions should not expect loss resulting from denial of the proposed use to be a persuasive argument in securing the change.

Lapkus, 30 Ill. 2d at 310, 196 N.E.2d 682; *see also National Advertising Co. v. Village of Downers Grove*, 204 Ill. App. 3d 499, 512, 149 Ill. Dec. 604, 561 N.E.2d 1300 (1990) (quoting *Lapkus*).

We note also that plaintiffs again rely on *Gibson* and *Welch*. However, we agree with the City's observation that the holding in *Lapkus* undermines plaintiffs' reliance on those cases. As we stated above, both *Gibson* and *Welch* concerned the issue of whether the respective lots were buildable, but they are distinguishable from the present case because the property owners purchased the lots before the zoning ordinances that precluded construction had been passed. In this case, however, the zoning regulation would not allow construction on the Sherwood lot when plaintiffs purchased the entire parcel. *See La Grange State Bank v. Village of Glen Ellyn*, 227 Ill. App. 3d 308, 318, 169 Ill. Dec. 307, 591 N.E.2d 480 (1992).

Plaintiffs argue that the distinction between the present case and *Welch* and *Gibson* is irrelevant when the case is in the pleadings stage. Plaintiffs argue that they are not precluded from bringing a takings claim simply because they purchased the property after the property was rezoned. In support, plaintiffs cite *Furling v. County of Sangamon*, 126 Ill. App. 3d

851, 81 Ill. Dec. 775, 467 N.E.2d 646 (1984), wherein the plaintiff was not foreclosed from challenging the validity of a preexisting zoning ordinance. There is no question that an individual has the right to constitutionally challenge a zoning regulation. A zoning ordinance cannot be sustained if it violates the constitution, no matter how long or by whom it is recognized as legal. La Salle, 12 Ill. 2d at 43, 145 N.E.2d 65. While we agree that plaintiffs are not prevented from bringing a constitutional claim merely because they bought their property when the ordinance was in existence, it does not mean that their challenge necessarily will succeed. It simply means that, because no separate single-family home could have been built on the Sherwood lot when plaintiffs acquired it, their argument concerning whether the ordinance denied them the economically viable use of their land has lost its persuasiveness.

a. Uses and zoning of nearby property

Plaintiffs' allegations set forth linear facts explaining that for a distance of 100 feet and 250 feet surrounding the Sherwood lot are adjacent lots which are the same size as or smaller than the Sherwood lot. Plaintiffs further allege that all of the lots on Sherwood Avenue directly across the street from their property have homes on them and are less than 50% of the size of the Sherwood lot. These allegations presume that the street, as a line of demarcation, is irrelevant and presume that the lots are comparable without explaining how they are comparable. It is reasonable for the City to use a street as a line of demarcation when applying a zoning ordinance. *See La Grange State Bank v. Village of Glen Ellyn*, 227 Ill. App. 3d 308, 316, 169 Ill. Dec. 307, 591 N.E.2d 480 (1992).

b through d. Diminution in property values, promotion of public welfare, and gain-loss balance

Plaintiffs allege that prohibiting the building of a single-family home on the Sherwood lot would deny them "reasonable economic use" of the property because they cannot build anything on the lot. This is a legal conclusion that is unsupported by facts or affidavits. Moreover, because the property is considered as a whole, there can be no diminution in property value.

That plaintiffs have failed to allege facts to show that they have suffered a loss in value eliminates any argument plaintiffs could make as to the third and fourth factors, which presume some loss of value on the part of plaintiffs. Plaintiffs' argument concerning the fourth factor also fails because, to the extent there is any hardship to plaintiffs, it is purely self-created.

e through f. Suitability as zoned and length of time property remains vacant

Plaintiffs allege that, if the City is allowed to prohibit a home on the Sherwood lot, the effect would be to force plaintiffs to add together the total area of their two separate lots, resulting in their being held to a minimum lot size more than four times larger than many surrounding neighbors and more than twice as large as the rest. Plaintiffs ignore that their property is classified within the R-4 district and that the general purpose of that classification was to regulate the intensity of the use of lot areas to conserve open space and prevent overcrowding. Minimum lot area and width limitations help to sustain neighboring property values and promote the health and welfare of the public by preventing overcrowding and overuse of public services such as sewer and water. *La Grange State Bank*, 227 Ill. App. 3d at 313, 169 Ill. Dec. 307, 591 N.E.2d

480. The sixth factor concerning the length of time in which the property has remained vacant as zoned is irrelevant.

g through h. The community need and the care with which the community has undertaken its development plan

Plaintiffs' complaint alleges that the zoning history of the subject parcel from a minimum lot size of 20,000 square feet to 12,000 square feet and then back to 20,000 square feet had the effect of preventing only plaintiffs from building a single-family home on the Sherwood lot. Plaintiffs assert that this amounts to "spot zoning." "Spot zoning" is a change in zoning applied only to a small area that is out of harmony with comprehensive planning for the good of the community, zoning that would violate a zoning pattern. *Chicago Title & Trust Co. v. Village of Skokie*, 60 Ill. App. 3d 221, 235, 17 Ill. Dec. 314, 376 N.E.2d 313 (1978). As stated above, plaintiffs' allegations ignore that the City has undertaken a comprehensive plan to use Sherwood Avenue as a line of demarcation between zoning districts and define the lot area and width limitations of the zoning district in which plaintiffs' property sits to sustain neighboring property values and to conserve the preservation of openness created by the R-4 zoning district.

In sum, given the presumption of the constitutionality of the zoning ordinance, we conclude that plaintiffs' complaint fails to allege sufficient facts to state a claim of a taking or a violation of substantive due process, and therefore, count II of plaintiffs' complaint was properly dismissed.

Under the federal constitution, a land use regulation does not constitute a taking if it substantially advances legitimate state interests, has a sufficient "nexus" or "connection" to the accomplishment of the interests, and does not deny an owner economically viable use of his land. *Northern Illinois Home*

Builders Ass'n v. County of Du Page, 165 Ill. 2d 25, 32, 208 Ill. Dec. 328, 649 N.E.2d 384 (1995).

Plaintiffs do not dispute that the City has legitimate interests at stake. *See Reitman v. Village of River Forest*, 9 Ill. 2d 448, 453, 137 N.E.2d 801 (1956) (minimum lot area requirements are permissible because they prevent congestion and promote safety). Moreover, we find that a sufficient nexus exists between reducing density and providing the contiguous ownership regulation to prevent construction on lots of substandard size. *See Klehr v. Zoning Board of Appeals*, 24 Ill. App. 3d 512, 518-20, 320 N.E.2d 498 (1974).

Plaintiffs' complaint states that the City's regulations denied them the economically viable use of their property. A government regulation can effect a taking if it improperly "interferes with reasonable investment- backed expectations." *Palazzolo*, 533 U.S. at 617, 121 S. Ct. at 2457, 150 L. Ed. 2d at 607.

Plaintiffs cite *Palazzolo* again for the proposition that it has rendered irrelevant the fact that plaintiffs knew that they could not build on the vacant property when they bought it in determining whether a regulation interferes with reasonable investment-backed expectations. As we explained earlier, we disagree with this logic. Justice O 'Connor's opinion indicates that the role of investment-backed expectations in regulatory takings cases is well settled. *See Palazzolo*, 533 U.S. at 634-36, 121 S. Ct. at 2466-67, 150 L. Ed. 2d at 617-19 (O'Connor, J., concurring). Indeed, if the court in *Palazzolo* had intended to discard this long-standing element of regulatory takings analysis, it presumably would have been more explicit about doing so.

Moreover, in the context of a regulatory taking, the fact that a regulatory ordinance was in place before the owner

purchased the property is relevant to the owner's investment-backed expectations. *See Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2001). Here, plaintiffs' reasonable investment-backed expectations are an especially important consideration in the takings analysis, given that plaintiffs had full knowledge of the land use regulation when they purchased the property more than 30 years ago. A mere diminution in property value which results from regulation does not amount to a taking and a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned. *Penn Central*, 438 U.S. at 131, 98 S. Ct. at 2663, 57 L. Ed. 2d at 652-53.

Plaintiffs' allegations must present sufficient facts to show that the property is either unsuitable for use as zoned or unmarketable as zoned. Although there may be a disparity between the value of the land with a single home as compared to two homes, plaintiffs provide no facts or affidavits of the extent of that disparity. Plaintiffs' complaint alleges only that they were denied the economically viable use of their property. However, this allegation is a legal conclusion which plaintiffs fail to support with factual allegations or affidavits. Furthermore, where an ordinance is an otherwise valid exercise of a municipality's police powers, the fact that the ordinance deprives the property of its most beneficial use will not render it an unconstitutional taking. *Goldblatt*, 369 U.S. at 592, 82 S. Ct. at 989, 8 L. Ed. 2d at 133. Plaintiffs have failed to state a constitutional claim for a taking under the federal constitution. Accordingly, count III of plaintiffs' complaint was properly dismissed.

Plaintiffs next contend that the circuit court erred in dismissing count IV of the complaint for failing to state a claim for a violation of the equal protection clause under the United States and Illinois Constitutions. Equal protection analysis is

identical under the United States and Illinois Constitutions. *Jacobson v. Department of Public Aid*, 171 Ill. 2d 314, 322, 216 Ill. Dec. 96, 664 N.E.2d 1024 (1996). The essential test of equal protection is whether the government deals with similarly situated individuals in a similar manner. *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 466, 261 Ill. Dec. 492, 763 N.E.2d 741 (2002). In evaluating equal protection claims, courts determine whether the government's classification implicates a protected class or affects fundamental rights. *Segers v. Industrial Comm'n*, 191 Ill. 2d 421, 436, 247 Ill. Dec. 433, 732 N.E.2d 488 (2000). Land use regulations typically do not implicate any protected class or fundamental right. *See, e.g., Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir.2000).

Plaintiffs allege that the City's zoning regulation prohibited them from building a home on their property and that

> [u]pon information and belief, Defendant City of Highland Park has permitted other persons within the city to build a home on a lot that was held in common ownership after 1960, which decisions to permit home building were and are rationally indistinguishable from the Plaintiffs' request.

Plaintiffs do not argue that this case implicates fundamental rights or suspect classes. Their equal protection claim is based on bare unequal treatment.

Plaintiffs may challenge land use decisions under the equal protection clause under a "class of one" theory. To state a cause of action under this theory, plaintiffs must prove that they were intentionally treated differently from others who were similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed.2d 1060, 1063 (2000).

Defendants argue that, under *Olech*, plaintiffs must prove that animus motivated defendants' decision. However, we need not address this argument here because plaintiffs' equal protection claim is unsustainable on other grounds. Plaintiffs still must plead that there is no rational basis for the difference in treatment.

Economic or social legislation is normally presumed to be constitutional and will be upheld if it is rationally related to a legitimate state interest. *Douglas by Douglas v. Stallings*, 870 F.2d 1242, 1245 (7th Cir.1989). In the area of economics and social welfare, a state does not violate the equal protection clause "merely because the classifications made by its law are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491, 501 (1970). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because * * * 'in practice it results in some inequality.'" *Dandridge*, 397 U.S. at 485, 90 S.Ct. at 1161, 25 L. Ed. 2d at 501-02, quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369, 377 (1911). To demonstrate a viable equal protection claim in the land-use context where there is no fundamental right or suspect class, the plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives. *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). Economic regulation will be upheld, even without any express findings or legislative history, if there is any reasonably conceivable state of facts that could provide a rational basis for the legislation. *Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 806 (7th Cir.1999).

Plaintiffs allege that the failure to permit the development of a single-family home on the Sherwood lot is arbitrary, capricious, and unrelated to the public health, safety, and welfare. Plaintiffs further allege that the refusal to permit

plaintiffs to build on their lot while permitting others to build on undersized lots in the same neighborhood or district is rationally incompatible. While we must assume that these claims are true for purposes of a section 2-615 motion to dismiss, this does not mean that plaintiffs have pled governmental action "wholly impossible to relate to legitimate governmental objectives." As pointed out in the case of *Vigilante v. Village of Wilmette*, 88 F. Supp.2d 888, 891 (N.D. Ill. 2000), which we find equally applicable here:

> It might be just that the Village thinks that the sort of development [plaintiff] requested would be inappropriate in the particular circumstances, and that therefore a variance is not called for. Perhaps the Village is concerned about the character of the neighborhood, something it does not think was affected by the previous variances, but would be affected by granting [plaintiff's]. The cumulative effect of small changes, each of which by itself is insignificant, may make a difference here.

As in *Vigilante*, we believe that the City is concerned about the character of the neighborhood and therefore properly found that a variance is not called for. The denial of plaintiffs' variance is thus rationally related to a legitimate government objective supported by a reasonably conceivable set of facts, and the regulation must be upheld. Therefore, plaintiffs' complaint fails to state a cause of action for a claim of equal protection and accordingly was properly dismissed.

It should be noted that this opinion is fact intensive and our decision is applicable only to the specific facts as set forth herein. *See American National Bank & Trust Co. of Chicago v. Village of Libertyville*, 269 Ill. App.3d 400, 406, 206 Ill. Dec. 761, 645 N.E.2d 1013 (1995) (courts have noted that the

attempt to apply res judicata to zoning cases is difficult because "the facts involved may change over time").

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

McLAREN, J., concurs.

Justice O'MALLEY, dissenting:

I believe plaintiffs presented an overwhelming case for a variance before the Board and that its decision denying plaintiffs' request was against the manifest weight of the evidence. What particularly persuades me of this is the economic harm that the minimum lot size restrictions have caused plaintiffs, which I believe the majority incorrectly measures. I also believe the majority is wrong to uphold the trial court's dismissal of plaintiffs' constitutional claims. In so doing, the majority not only again miscalculates the economic harm done to plaintiffs, but also vastly understates plaintiffs' allegations comparing the Sherwood lot with nearby lots.

I address first the majority's assessment of the economic harm the zoning ordinance has caused plaintiffs. I cannot join the majority in accepting *Tim Thompson*'s holding that a landowner's claim of specific economic harm to a duly platted lot of land is to be diluted by weighing that harm against the value of all land held by the owner that is contiguous to the lot. *Tim Thompson*'s source for the "parcel as a whole" doctrine was the Supreme Court cases of *Keystone* and *Penn Central*, which held, respectively, that neither coal deposits beneath a parcel's surface nor the air above it is a separate piece of property for takings purposes. In so holding, the Supreme Court reasoned: "'Taking' jurisprudence does not divide a

single parcel of land into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'" *Keystone*, 480 U.S. at 497, 107 S. Ct. at 1248, 94 L. Ed.2d at 496, quoting *Penn Central*, 438 U.S. at 130-31, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652. The Court reasoned further in *Keystone*:

> The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.

Keystone, 480 U.S. at 498, 107 S. Ct. at 1248-49, 94 L. Ed.2d at 496.

The facts at hand are not analogous to any of the scenarios, hypothetical or actual, analyzed by the Supreme Court in *Keystone* and *Penn Central*. Plaintiffs are not seeking this court's complicity in some devious "gerrymandering" of property divisions; we are not called on to give legal significance to imaginary lines so as to artificially enhance the economic harm to the Sherwood lot. The majority mechanically applies *Keystone*'s and *Penn Central*'s analysis to the facts at hand, but such disregard of the particular circumstances of this case is neither necessary nor appropriate.

The Supreme Court itself has admitted that takings cases are essentially "ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659, 57 L. Ed.2d at 648, citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S. Ct. 987, 990, 8 L. Ed.2d 130, 134 (1962). Moreover, the Supreme Court has expressly denied that its cases have settled on a formula for defining how economic harm should be assessed in cases where only a portion of an owner's property is directly affected by a zoning regulation. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n. 7, 112 S. Ct. 2886, 2894 n. 7, 120 L. Ed.2d 798, 813 n. 7 (1992), the Supreme Court stated:

> Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner suffered a mere diminution in value of the tract as a whole.

The Court went on to characterize its approach in *Penn Central* as "unsupportable" and noted that "the uncertainty regarding the composition of the denominator in [the] 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Lucas*, 505 U.S. at 1016 n. 7, 112 S. Ct. at 2894 n. 7, 120 L. Ed.2d at 813 n. 7. As an example of such inconsistency, the Court compared *Keystone* and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), which the Court viewed as reaching divergent results based on "nearly identical" regulations. *Lucas*, 505 U.S. at 1016 n. 7, 112 S. Ct. at 2894 n. 7, 120 L.

Ed.2d at 813 n. 7; *see also Keystone*, 480 U.S. at 517 n. 5, 107 S. Ct. at 1258 n. 5, 94 L. Ed.2d at 509 n. 5 (Rehnquist, J., dissenting) (in announcing in *Penn Central* that takings jurisprudence does not divide a "single parcel" into "discrete segments," the Court "gave no guidance on how one is to distinguish" a "single parcel" from a "discrete segment"); M. Snow, *Defining the Relevant Property in Regulatory Takings Claims*, 17 J. Land Resources & Envtl. L. 403, 417 (1997) (the language in Lucas is a "clear warning[ ] * * * that parties should not assume that previously settled case law has accurately established a test for determining what constitutes the relevant property in a takings claim"). I find it odd that the majority so hastily accepts as fixed and settled a particular definition of the relevant parcel for takings purposes when the Supreme Court, the originator of that definition, is not willing to admit to such rigidity, and when courts and commentators are starkly divided over the proper approach to defining the relevant parcel.[1] *See* 17 J. Land Resources & Envtl. L. at 411 ("The problem of whether the relevant property should be defined in broad or narrow terms remains a hotly debated issue today"). Courts in several cases have refused to view all of an owner's contiguous land as the relevant parcel in the facts before them and instead opted for a flexible, fact-specific approach to defining the relevant parcel. *See Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw.1986); *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 780 N.E.2d 998 (2002).

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[1] In addition to *Keystone* and *Penn Central*, the majority relies on *Bevan*, a Michigan case. *Bevan* was decided before the Supreme Court's retreat from *Penn Central* and *Keystone* in *Lucas*, and therefore is of doubtful vitality.

I find it notable that, in asking us to examine the harm to the Sherwood lot in isolation from the rest of their property, plaintiffs ask us simply to recognize the lot boundaries already recognized by the City of Highland Park. The City's zoning ordinances attach definite legal consequences to lot lines. Witness, for instance, section 150.104(A) of the Highland Park Zoning Ordinance of 1997, which provides:

> When two or more parcels of land (which may contain a lot or lots of record), are adjacent and one or more of such parcels lack adequate area or width to qualify for a permitted use under the requirements of the zoning district in which such parcels are located, all of such parcels shall be maintained and used as one zoning lot for such use if such parcels have been held in contiguous ownership at any time after May 8, 1960 * * *.

Highland Park Zoning Ordinance § 150.104(A) (1997).

In my view, this section has two effects. First, it combines two or more adjacent undersized lots into one lot for the purpose of minimum lot size requirements, thus potentially allowing development in cases where it would otherwise be prohibited. Conversely, it prohibits an owner from shifting lot lines so as to create one or more conforming lots.[2] Therefore,

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[2] Plaintiffs claim that section 150.104(A) has thwarted their plans to build because it prohibits the "separation" of their contiguous lots. Why plaintiffs would seek mere "separation" of their lots is not clear, however, for neither lot meets the current size requirements. Plaintiffs have, it seems, gotten the majority to subscribe to their strange notion, and so the majority writes that section 150.140(A) prevents plaintiffs from building because it "den[ies] permission for[ ] the separation of contiguous undersized lots that are held under the same ownership." Op. 278 Ill. Dec. at 921, 799 N.E.2d at 786. I

(continued...)

if any party in this case is overreaching, it is the City, for, in urging an inclusive definition of plaintiffs' property that disregards internal lot divisions, it is downplaying the significance of the very lot line to which its zoning ordinances ascribe importance. In my view, the only proper approach is to recognize, as does the City's zoning ordinance, the lot line dividing plaintiffs' property and to define the relevant property for takings purposes as simply the Sherwood lot. In my view, the economic harm to the Sherwood lot is devastating, for the ordinance precludes building on the lot. Since, in my assessment, plaintiffs clearly proved their case for a variance before the Board, I believe the Board's decision was against the manifest weight of the evidence.

I also cannot accept the majority's approval of the dismissal of plaintiff's constitutional challenges to the ordinance. In reviewing a section 2-615 motion to dismiss a complaint for failure to state a cause of action, the court must assume the truth of all well-pleaded facts and draw all reasonable inferences therefrom in favor of the nonmoving party. *Jackson*, 197 Ill. 2d at 44-45, 258 Ill. Dec. 79, 755 N.E.2d 462. Not only does the majority, in discussing this issue, repeat its mistaken calculation of the economic damage suffered by plaintiffs, it also gives short shrift to plaintiffs' allegations concerning the zoning and uses of nearby property. The majority summarizes plaintiffs' allegations on this point in the following statement: "Plaintiffs' allegations set forth linear facts explaining that for a distance of 100 feet and 250 feet surrounding the Sherwood lot are adjacent lots which are the same size as or smaller than the Sherwood lot." Op. 278 Ill.

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[2] (...continued)
fail to see how section 150.140(A) prevents plaintiffs from having their lots separated or what plaintiffs would gain by the separation.

Dec. at 931, 799 N.E.2d at 796. The majority discounts plaintiffs' allegations as "presum[ing] that the lots are comparable without explaining how they are comparable." Op. 278, Ill. Dec. at 931, 799 N.E.2d at 796. The majority itself presumes, mistakenly, that lot size alone is not an adequate basis for comparison. *See Gibson*, 97 Ill. App.3d at 1038, 54 Ill. Dec. 569, 425 N.E.2d 434 (comparing sizes of nearby lots to assess the utility of minimum size restriction); *Thompson v. Cook County Zoning Board of Appeals*, 96 Ill. App.3d 561, 577-78, 51 Ill. Dec. 777, 421 N.E.2d 285 (1981) (same); *Welch*, 65 Ill. App.3d at 254, 22 Ill. Dec. 295, 382 N.E.2d 615 (same). Plaintiffs alleged that the Sherwood lot (15,415 square feet in size) is "the only vacant nonconforming lot in the area." Plaintiffs further alleged that the "majority" of lots in the vicinity of Sherwood Avenue are no larger than the Sherwood lot and that most are in fact "considerably smaller" than the Sherwood lot. Plaintiffs averred that, of the nine lots located within 100 feet of the Sherwood lot, eight are the same size as or smaller than the Sherwood lot and four are only 7,500 square feet in size. Plaintiffs also alleged that, of the 18 lots within 250 feet of the Sherwood lot, 15 are the same size as or smaller than the Sherwood lot and half are smaller than 10,000 square feet.

These allegations are critical because, if true, they would undercut the City's rationale for demanding that plaintiffs' lot comply with the minimum lot size restrictions. Under the federal constitution, a land use regulation does not constitute a taking if it substantially advances legitimate state interests and does not deny the owner economically viable use of his land. *Northern Illinois Home Builders*, 165 Ill.2d at 32, 208 Ill. Dec. 328, 649 N.E.2d 384. In my view, plaintiffs have successfully alleged not only that the City's minimum lot size restrictions deny them economically viable use of the Sherwood lot, but also that the restrictions advance no legitimate state interest because plaintiffs' lot is the only undeveloped nonconforming

lot within a *significant radius and, moreover, is significantly* larger than many of the surrounding lots, which are developed nonconforming lots.

Whether an ordinance effects a taking under the Illinois Constitution requires consideration of a set of factors enumerated in *La Salle*. Although no single factor or subset of factors controls the analysis (*La Salle*, 12 Ill. 2d at 47, 145 N.E.2d 65; *Tim Thompson*, 247 Ill. App.3d at 872, 187 Ill. Dec. 506, 617 N.E.2d 1227), the factor that is of "'paramount importance'" in the analysis is "'whether the restrictions imposed on the property are in conformity with the uses and zoning of nearby property.'" *Rodriguez*, 217 Ill. App.3d at 1028, 160 Ill. Dec. 878, 578 N.E.2d 57, quoting *Amalgamated Trust & Savings Bank v. County of Cook*, 82 Ill. App.3d 370, 381, 37 Ill. Dec. 717, 402 N.E.2d 719 (1980); accord, *Northern Trust Bank/Lake Forest, N.A. v. County of Lake*, 311 Ill. App.3d 332, 337, 243 Ill. Dec. 668, 723 N.E.2d 1269 (2000). If we assume, as we must at this stage, that plaintiffs hold the only undeveloped nonconforming lot in the area and many of the developed lots are either the same size as or significantly smaller than plaintiffs' lot, then plaintiffs have, in my view, demonstrated that holding them to the minimum lot size restrictions has no utility. Although I will not address all of the remaining *La Salle* factors here, I believe plaintiffs have the better argument on each of them. In particular, plaintiffs have shown that the minimum lot size restriction has caused devastating economic harm. I believe, therefore, that it was error for the trial court to dismiss plaintiffs' state constitutional claims.

Appendix B-1

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of March, 2004.

Present: Mary Ann G. McMorrow, Chief Justice
Justice Charles E. Freeman — Justice Thomas R. Fitzgerald
Justice Robert R. Thomas — Justice Thomas L. Kilbride
Justice Rita B. Garman — Justice Philip J. Rarick

On the twenty-fourth day of March, 2004, the Supreme Court entered the following judgment:

No. 97525

LaSalle National Bank, as Trustee ofTrust No. B8000213124, Esther P. and Ronald Z. Emmerman,

Petitioners

v.

The City of Highland Park et al., etc.,

Respondents

Petition for Leave to Appeal from Appellate Court
Second District
2-02-1012
01MR703

The Court having considered the Petition for leave to appeal and being fully advised of the premises, the Petition for leave to appeal is DENIED.

Appendix B-2

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this fifteenth day of April, 2004.

/s/ Juliann Hornyak Clerk,
Supreme Court of the State of Illinois

Appendix C-1

STATE OF ILLINOIS)
) ss
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY ILLINOIS

LaSalle National Bank, et al.,	)	Filed Apr. 11, 2002
	)	
vs.	)	Gen. No. 01 MR 703
	)	
City of Highland Park	)	
	)	

ORDER

This matter having come to be heard on City of Highland Park defendants' motion to dismiss counts II, III and IV of plaintiffs' amended complaint, the parties having appeared and argument having been heard,

IT IS HEREBY ORDERED THAT:

Defendants' motion to dismiss counts II, III and IV of the amended complaint is hereby granted, for the [reasons] stated by the Court in open court.

This action is set for status hearing on May 22, 2002, ary (sic) without further notice.

Appendix C-2

Waukegan, Illinois this ____day of_____, 20___,

ENTER

_____
Judge

PREPARED BY:_____
(Please Print Name and Address)

Appendix D-1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 16, 2004

Mr. James S. Burling
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Re: Ester P. Emmerman, et vir
v. City of Highland Park, Illinois, et al.
Application No. 03A1009

Dear Mr. Burling:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on June 16, 2004 extended the time to and including August 21, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Melissa Blalock
Case Analyst

Appendix D-2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. James S. Burling
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Clerk
Appellate Court of Illinois, Second District
55 Symphony Way
Elgin, IL 60120-5558

(2)

Supreme Court, U.S.
FILED
OCT 6 - 2004
OFFICE OF THE CLERK

No. 04-242

In The Supreme Court of the United States

ESTER P. EMMERMAN and
RONALD Z. EMMERMAN,

Petitioners,

v.

THE CITY OF HIGHLAND PARK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW RESTATED

Is there an unconstitutional taking of property when a municipality denies a variance for development on a substandard lot based upon a fact-based application of its zoning ordinance, which ordinance contains a presumptively valid provision that prohibits separate development of contiguous, commonly-owned non-conforming lots when those contiguous lots can be aggregated and developed as a conforming lot?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

In 1968, Petitioners bought a residential property consisting of a house and backyard. Although the property included two platted lots, neither lot would have met the minimum lot size requirement of the zoning district in which the property was located. Pet. App. A-3. At the time Petitioners purchased the property, and at all times since, a municipal ordinance (the "Ordinance") has prohibited the separate development of a substandard lot when the substandard lot is contiguous to a commonly owned lot with which it can be developed. Pet. App. A-3. Thus, at the time Petitioners bought the property they could not have separately developed either substandard lot independently of the other. Consequently, the purchase price Petitioners paid was for the entire property, unapportioned between the lots.

For more than 30 years, Petitioners continued to use and enjoy the entire property as their residence. In 2001, Petitioners applied for a zoning variation to build a new house on that portion of the property that was their backyard. The new house would be in addition to the house that Petitioners already owned and occupied. After a factual hearing, the municipal zoning board applied the long-standing Ordinance, and denied the requested variation.

Although Petitioners assert that application of the Ordinance constituted an unconstitutional taking of their property, in fact the Ordinance does not prevent them from using any part of their property, nor does it deprive them of all economically viable use of their property. This

type of ordinance is, moreover, a common zoning regulation used by municipalities throughout the country to prevent separate development on substandard lots, the legitimacy of which has been repeatedly upheld by numerous state courts.

A. Factual Background

Respondents discuss Petitioners' factual omissions and mischaracterizations of the facts in their Reasons For Denying the Petition.

B. Judicial Proceedings

Petitioners' claims have been rejected at every stage below. Their petition for a variance was denied by the zoning board after a lengthy hearing. The denial was upheld by the Illinois circuit court and the Illinois appellate court. The circuit court dismissed Petitioners' takings claim, and was affirmed by the appellate court. The Illinois Supreme Court denied a petition for leave to appeal.

The decision of the Illinois appellate court is consistent with the takings analysis of this Court, the federal circuit courts, and the courts of other states. Petitioners rely primarily on the dissenting opinion below. But, as discussed in the Reasons For Denying the Petition, the dissent ignored a number of factual considerations discussed by the majority, and the dissent arrived at a relevant parcel by a means that this Court has repeatedly rejected.

REASONS FOR DENYING THE PETITION

Petitioners' assertion that the decision below was unfair and unjust is baseless. The denial of Petitioners' takings claim was fully consistent with all of the legal and equitable principles of takings analysis. Indeed, in the

realm of regulatory takings cases, where a diminution of value may still not constitute a taking (*see, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131 (1978)) (the Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' ")), Petitioners here have suffered no injury at all. They still have every bit of property interest they purchased, and they are not, in any event, precluded from developing any portion of their property. Moreover, the zoning regulation they seek to challenge is patently legitimate.

Petitioners' contention that there is a conflict among the circuits and among the state courts is also baseless. Petitioners point out that in some takings cases the courts have aggregated commonly owned contiguous properties as the relevant parcel for analysis and in other cases they have not. Petitioners' error is their presumption that there must be a *per se* rule that requires the result to be always one or always the other. In fact, the courts have consistently made a case-specific factual analysis, which inherently will produce a relevant parcel determined by the particular facts of the case. There is no conflict below.

Moreover, even if this Court were disposed to further address the global issue Petitioners have raised, the instant case would not be an appropriate vehicle for that purpose. This case does not involve the one-strand-in-a-bundle-of-rights issues that often arise in cases involving vertical or temporal relevant parcel analyses. This case also does not present typical horizontal relevant parcel issues that would be of general significance in regulatory takings cases. Here there has been no denial of the use of any part of Petitioners' property, and the Ordinance Petitioners challenge is a widely used zoning regulation that has been repeatedly upheld.

For all of these reasons, the petition for certiorari should be denied.

I. THE DECISION BELOW IS NEITHER UNFAIR NOR UNJUST

Petitioners have lost nothing. First, Petitioners are not prohibited from continuing to use or develop their property. Second, they have exactly the same property rights today as when they bought the property. The proposition "that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 130. Here, Petitioners have not even lost "a property interest that they heretofore had believed was available for development." They have everything they had at the time they purchased the property.

In 1968, Petitioners bought a residential property ("Property") in the City of Highland Park, Illinois ("City"), with a house on the front and a large backyard. Although the Property was platted as two lots, it was owned, used and sold to Petitioners as a single parcel. Petitioners bought the Property for a single price of $45,000, there being no allocation between the two platted lots. Pet. App. A-19. There was an obvious reason for treating the Property as a single parcel. The zoning district in which it was located had, at that time, a minimum buildable lot size of 40,000 square feet. Pet. App. A-3. The two contiguous lots Petitioners purchased were each 15,415 square feet (*id.*), so neither lot, by itself, could be a lawful, conforming, lot on which a single family residence could be built. The City's zoning code, then as now, prohibited the separation of commonly-owned contiguous lots to create separate, isolated, non-conforming lots. *Id.* Thus, at the time Petitioners bought the Property, they had no basis to believe that the rear, backyard lot was a separable "property interest . . . available for development," nor could they have had any investment expectations with respect to the

rear lot as a separate buildable property.[1] There has never been any prohibition of construction on the rear lot, so long as such construction is within the zoning for the Property as a whole – the only prohibition is against separating the rear lot to create an isolated non-conforming lot – indeed, in this case to create not one, but two, substandard lots.

For more than 30 years Petitioners utilized the entire Property as their residence. Since 1970, the minimum lot size in Petitioners' zoning district has been 20,000 square feet. Pet. App. A-4.

In 2001, Petitioners sought a variance to allow them to build a second house on the Property – that is, a separate house on the non-conforming rear lot of the Property. *Id.* At the public hearing on the variation request, Petitioners admitted that the Property that they had bought for $45,000 was now worth $800,000 to $1 million. Pet. App. A-8. The City's Zoning Board of Appeals ("ZBA") found that Petitioners had failed to make the required showing to justify a variance that would exempt them from the existing zoning and allow them to create two substandard lots. Pet. App. A-4-5. The ZBA also found that, under the factual circumstances, denial of the variance would not deny Petitioners either the economic value of their property or their reasonable investment expectations. Pet. App. A-8-10.

Petitioners then brought this action.

Petitioners point out that an individual, isolated, non-conforming lot that fails to meet the minimum lot size requirement will ordinarily be treated as buildable despite that fact that it is a substandard lot. From this,

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[1] The fact that a regulation exists at the time a property is purchased does not preclude a takings claim, but is relevant to the purchaser's investment expectations. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 633-35 (2001) (O'Connor, J., concurring).

Petitioners leap to the conclusion that there is no constitutional justification for a zoning ordinance that precludes the separate development of a substandard lot that is commonly owned with a contiguous lot. A moment's thought demonstrates the dramatic difference between the two situations. A zoning district may, due to historical quirks in the way in which lots were platted over time, contain some isolated, separately-owned lots that do not meet the minimum lot size. An exception to the district's minimum lot size zoning to allow construction on such non-conforming lots may be necessary to prevent those isolated non-conforming lots from being forever non-buildable and largely worthless. This compromise from the desired zoning in the district is unfortunate from a public interest standpoint, but arguably necessary. However, there is no such justification to deviate from applying consistent zoning throughout a zoning district when a non-conforming lot is contiguous to, and in common ownership with, another lot. Because such a non-conforming lot can be built upon in conjunction with the contiguous, commonly owned lot, the problem of an isolated, unbuildable, lot does not exist and there is no reason to make an exception to the desired zoning in the district. The public interest objective is to have as few separate substandard lots as possible. There is certainly no justification for allowing the creation of *new*, isolated, non-conforming lots. This is particularly true when, as here, the zoning requirement existed when the property was purchased and the buyer could have had no investment expectations regarding that aspect of the property.

As discussed more fully in Section III.B.2 below, zoning ordinances designed to deal with this specific issue by prohibiting the separation of contiguous commonly owned non-conforming lots are a common zoning regulation throughout the country, their legitimacy having been repeatedly upheld by various state courts as an appropriate exercise of the police power.

Petitioners omit important facts and mischaracterize others in an effort to create an image of injustice. They ignore the existence of separate, distinct, zoning districts, and, despite dropping their equal protection claim, they erroneously imply that they have been singled out and discriminated against. Petitioners state on pages 3 and 4 of their petition that "[m]any of the lots in the neighborhood are the same size or smaller than [Petitioners' lot], and so are also deemed to be non-conforming. Nevertheless, the City has allowed all to be residentially developed." Petitioners repeat on page 23 of their petition that, "[o]ver time, the City has agreed to the residential development of these undersized lots, [Petitioners'] vacant lot being the only exception." As the basis for these statements, Petitioners cite to the dissenting opinion below at Pet. App. A-37. But that is not what is said there. Rather, the dissent merely recites Petitioners' allegations that the majority of lots "in the vicinity of Sherwood Avenue" (on which Petitioners' lot is located) are no larger than Petitioners' lot and that many lots within 100 feet and within 250 feet of Petitioners' lot are the same size as or smaller than Petitioners' lot. The dissent also notes Petitioners' allegation that their lot is "the only vacant non-conforming lot in the area." This simply does not support Petitioners' foregoing statements that development has been allowed on many non-conforming lots or Petitioners' innuendo that they have been discriminated against.

Petitioners' misstatements and omissions are misleading in two respects. First, both Petitioners and the dissent below omit the fact that Sherwood Avenue, on which Petitioners' Property is located, is the dividing line between two of the City's zoning districts, and that the R-6 zoning district across the street has a much smaller minimum lot size than the R-4 zoning district in which Petitioners' lot is located. Pet. App. A-4. As the majority opinion below observes, Petitioners erroneously ignore the different zoning classifications and presume that the smaller lots in the different zoning district should be treated as comparable to

Petitioners' lot. Pet. App. A-23. It is both self-evident and judicially well-established that the boundaries of a zoning district must be drawn somewhere; if a property owner had the right to demand the same minimum lot size zoning as that in a different zoning district across the street from his property there would be no enforceable boundaries to zoning districts. *See, e.g.,* 2 Young *Anderson's American Law of Zoning* (4th ed. 1996) § 9.09 at 134-35 (hereinafter "*American Law of Zoning*").

Petitioners' innuendo of discrimination is also erroneous in that their allegation that Petitioners' lot is "the only non-conforming vacant lot in the area" does not indicate discrimination. It says nothing about how many non-conforming lots exist in Petitioners' zoning district. Obviously, the smaller lots in the other zoning district are not non-conforming as to Petitioners' minimum lot size requirement, because they are subject to a smaller minimum lot size requirement. Petitioners' allegation of being the only non-conforming vacant lot in the area also says nothing about whether any built-upon non-conforming lots may have been, unlike Petitioners' lot, isolated non-conforming lots, or whether they were built before the current lot size requirements were enacted.

Petitioners also assert that the decision below "allowed the City to impose an open space servitude on the Petitioners' vacant lot without paying for it." Pet. at 26. In truth, however, Petitioners knew at the time they bought their Property that they were buying land in a zoning district that had large minimum lot areas. Several adjacent zoning districts had smaller minimum lot areas. In denying the Petitioners' request for a variance, the ZBA found, *inter alia*, that the larger lots sizes in Petitioners' zoning district provided important open space relief from the more congested adjacent zoning districts. Pet. App. A-4, A-24. This Court has long recognized the legitimacy of

such open space considerations in zoning regulations. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) ("The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open space areas"). Moreover, there is no taking without compensation because the contiguous ownership provision merely enforces the zoning district's minimum lot size requirement while not prohibiting the development of any part of the Property.

In what is perhaps Petitioners' most audacious argument, they assert that treating their substandard lot as the separate, relevant parcel involves "little risk . . . [of] bestowing a windfall of compensation." Pet. 25. It is undisputed that Petitioners could not, at the time they bought the Property, have separately developed the rear, substandard lot under the applicable zoning. Pet. App. A-9. Consequently, they could not have had reasonable investment expectations regarding the separate development of that lot apart from the Property as a whole, nor does the record reflect that they paid a price for the Property that would reflect any such investment expectations. Investment expectations are a significant factor to be considered in takings analysis. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 326 fn. 23 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 634-36 (2001) (O'Connor, J., concurring). Although this factor is not alone determinative (*id.*), it surely undermines Petitioners' argument here that there is "little risk" of them receiving windfall compensation.[2]

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[2] Petitioners' suggestion that there will be no windfall compensation to themselves because owners of isolated non-conforming lots are generally allowed to build on them is misplaced. As discussed above, an exception to the minimum lot size requirement may be necessary for

(Continued on following page)

In summary, Petitioners' entire Property is useable and it is just as useable today as it was the day Petitioners purchased it. There is nothing unjust about the denial of Petitioners' takings claim.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS NOR AMONG THE STATE COURTS

Petitioners assert that there is a conflict below with respect to how the relevant parcel of property is to be determined for purposes of analyzing whether a regulatory zoning restraint constitutes an unconstitutional taking of property without just compensation. Contrary to Petitioners' assertions, the cases they cite present no conflict among the federal circuits, nor among the state courts, nor with the prior rulings of this Court. Indeed, they demonstrate a remarkable consistency. Petitioners' argument that a conflict exists is based on the mistaken premise that there must be a *per se* rule that will either *always* result in commonly owned properties being aggregated as the relevant parcel or *always* result in commonly owned properties not being aggregated. In fact, at least with regard to the horizontal boundaries of the parcel, no such *per se* rule is possible, nor even desirable.[3] This Court's decisions have repeatedly called for case-specific factual determinations in regulatory takings cases. The federal and state courts below have consistently determined the

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isolated substandard lots. The different legal status of such property is known to buyers of such property and causes their investment expectations to be different from buyers of contiguous substandard lots, who know that they cannot separately develop their substandard lot.

[3] As one author stated, "[i]nitially, this Article was undertaken with the avowed purpose of developing a bright-line rule to help solve the denominator problem. However, the process of research and writing has demonstrated that this is not a desirable result." Lisker *Regulatory Takings and the Denominator Problem* 27 Rutgers L.J. 663 (Spring 1996).

relevant parcel in takings cases based on an examination of the facts of the specific case, applying guidelines articulated by this Court.

A. This Court Has Articulated Guidelines That the Courts Below Have Consistently Followed

1. Regulatory Taking Cases, In Contrast to Physical Taking Cases, Generally Require Ad Hoc Factual Examinations

This Court has consistently distinguished between the application of *per se* rules to physical takings cases and the case-specific factual examinations required in regulatory takings cases:

> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," *Penn Central,* 438 U.S. at 124, designed to allow "careful examination and weighing of all the relevant circumstances." *Palazzolo v. Rhode Island,* 533 U.S. 606, 636 (O'Connor, J., concurring).

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002).

The Court in *Tahoe* further stated that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner [citation omitted], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Id.* In contrast, the Court noted, government regulations such as those that ban certain private uses of a portion of the owner's property or forbid the private use of certain airspace, do not

constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and the economic effects of government actions." *Id.* at 323 (citing *Yee v. Escondido*, 503 U.S. 519, 523 (1992)).

There are two rather narrow exceptions in which a regulatory taking may be deemed a categorical taking without the usual case-specific inquiry: (1) when the regulation compels the owner to suffer a physical "invasion" of his property, and (2) when the regulation denies all beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The first exception, physical invasion, which is akin to a physical taking, does not require the determination of a relevant parcel. The second exception, the denial of all beneficial use, does require a determination of a relevant parcel and therefore can avoid a case-specific examination of the property only when the relevant parcel is undisputed (as in *Lucas*) or, at least, patently indisputable.

Thus, absent these exceptional circumstances, in the normal regulatory taking case there must be a case-specific examination of the facts. *See Tahoe*, 535 U.S. at 332 ("the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact-specific inquiry").

2. The Identification of the Relevant Parcel Is Inherently a Part of the Case-Specific Factual Examination

This Court has held that the "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property," thus requiring a determination of the

relevant parcel of property, sometimes referred to as the "denominator" of the fraction. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 497 (1987). The Court has made clear that there is no *per se* rule defining the relevant parcel simply as the property interest subject to the regulatory restriction: "defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban * * * We have consistently rejected such an approach to the 'denominator' question." *Tahoe*, 535 U.S. at 331.[4]

Rather, "in regulatory takings cases we must focus on 'the parcel as a whole.'" *Id.* Takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-31.

The Court's reference to the "parcel as a whole" and the "property in its entirety" does not, of course, resolve the specific factual question of what constitutes the whole parcel or the entire property, but it is part of the guidance the Court has provided for the factual inquiry. Amplifying on these phrases, the Court has frequently stated that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its

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[4] *See also Concrete Pipe & Products of Cal., Inc. v. Constructioner Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question").

entirety." *Keystone Bituminous*, 480 U.S. at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

More significantly, the case-specific factual determination of the relevant parcel must be made with reference to the issues upon which a claim of taking is analyzed. The Court stated in *Penn Central*, 438 U.S. at 124:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [citation omitted] So, too, is the character of the governmental action.

Accord Kaiser Aetna v. U.S., 444 U.S. 164, 175 (1979); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Recently, this Court stated in *Tahoe* that "[o]ur polestar . . . remains the principles set forth in *Penn Central* and the other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." 535 U.S. at 336.

Lower courts have determined the relevant parcel by making case-specific findings that identify a relevant parcel that is most appropriate under the particular facts within the context of their examination of the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action.

B. The Circuit Court Cases Cited By Petitioners Are Not In Conflict

Petitioners mistakenly argue that with regard to the determination of the relevant parcel there is a conflict between two Federal Circuit cases, on the one hand, and a decision of the District of Columbia Circuit, on the other. *Palm Beach Isles Associates v. U.S.*, 208 F.3d 1374 (Fed. Cir. 2000); *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171 (Fed. Cir. 1994); *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (DC Cir. 1999), *cert. denied*, 531 U.S. 812 (2000). The two Federal Circuit cases declined to treat certain properties initially purchased in common ownership as a single parcel whereas the District of Columbia Circuit did treat still-commonly-owned contiguous properties as a single parcel. There is no conflict in these decisions unless one assumes, contrary to common sense, that there must be a *per se* rule requiring aggregation or non-aggregation in every case, regardless of the specific facts involved. A case-specific factual analysis inherently presumes that some cases will properly result in aggregation and others not, as the facts dictate. The proper test of consistency is not whether aggregation does or does not occur in every case, but whether the courts have applied a consistent, reasoned analysis to decide the issue. In fact, they have.

The two Federal Circuit cases Petitioner cites, *Loveladies* and *Palm Beach Isles*, involved similar factual situations. In *Loveladies*, the plaintiff developer had purchased 250 acres in 1958 and thereafter developed or sold 199 of them. Subsequently, in 1972, section 404 of the Clean Water Act was enacted. Fifty of the remaining undeveloped 51 acres were under water. Under the Act plaintiff would require permits from the State of New Jersey and the Army Corps of Engineers in order to create landfill so as to develop that acreage. Plaintiff eventually agreed to a compromise with New Jersey under which only 12.5 of the 51 acres could be developed. The Corps of

Engineers, however, refused a permit. Plaintiff brought a taking claim.

The *Loveladies* court rejected plaintiff's argument that there should be a bright-line rule that the relevant parcel should, *ipso facto*, be deemed to be limited to the parcel for which the permit was applied. Rather, the court held that "[o]ur precedent displays a flexible approach, designed to account for factual nuances." 28 F.3d at 1181. The court further stated that "[t]hese factual nuances include consideration of the timing of the transfers in light of the developing regulatory environment." *Id.* Examining the factual background, the court concluded that the 199 acres developed or sold before the regulatory restrictions existed should not be included in the relevant parcel for takings analysis. The court further concluded that the 38.5 acres which plaintiff had committed to the State of New Jersey in exchange for its approval to develop 12.5 acres also should not be included because it would be of no further value to the plaintiff. The court thus concluded that the remaining 12.5 acres was the relevant parcel, and the court accepted the trial court's finding that without a permit its value was de minimus.

The Federal Circuit again made a similar case-specific factual analysis in *Palm Beach Isles*. The plaintiff there had bought 311.7 acres in 1956, of which 261 acres was "upland" property on one side of a road, whereas the remaining 50.7 acre parcel on the other side consisted of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land. The two parcels were subject to different zoning. In 1968 the plaintiff sold the 261 acres. Twenty years later, in 1988, the plaintiff applied to the State of Florida and the Corps of Engineers for permits to dredge and fill the submerged acreage. The Corps denied a permit and plaintiff brought a taking claim. Proceeding to determine the relevant parcel, the court noted that, "[a]s we said in *Loveladies Harbor*, '[o]ur precedent

displays a flexible approach, designed to account for factual nuances.'" 208 F.3d at 1381. The court observed that plaintiff had never planned to develop the two parcels as a single unit, that the purchase and sale of the 261 acres occurred before the environmental restrictions of the Clean Water Act were enacted in 1972, and that the development of the 261 acres "was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed." *Id.* at 1381. The court thus held that the relevant parcel was the 50.7 acres of wetlands and submerged lakebed. On rehearing, applying further case-specific factual analysis, the court concluded that within the 50.7 acres, the 1.4 acres of non-submerged wetlands was not subject to a navigational servitude and should be separately analyzed. 231 F.3d 1354, 1364 (Fed. Cir. 2000).

Petitioner erroneously asserts that the District of Columbia Circuit's decision in *District Intown Properties* is in conflict with the foregoing Federal Circuit decisions in *Palm Beach Isles* and *Loveladies*. In fact, all three decisions applied similar reasoning. In *District Intown Properties* the plaintiff had purchased in 1961 a property in the District of Columbia consisting of an apartment building and adjacent landscaped lawns. Unlike *Palm Beach Isles* and *Loveladies*, in *District Intown Properties*, the plaintiff ("District Intown") made no immediate effort to develop, sell or separate any part of the property. Rather, 27 years later, in 1988, District Intown subdivided the property into nine lots, one being the apartment building and the other eight being portions of the adjacent lawn. District Intown sought a permit to build townhouses on each of the eight "lawn" lots. Because the property was across the street from the National Zoo, any proposed development plans were subject to review by the District of Columbia Commission on Fine Arts pursuant to the Shipstead-Luce Act, which had been enacted in the 1930s to protect various

public buildings and parks. The Commission recommended against the permit and it was denied. District Intown brought a taking claim.

District Intown argued that the relevant parcel for purposes of determining the regulatory impact on its property should be limited to the eight "lawn" parcels for which a permit was sought and should not include its contiguous existing apartment building. The plaintiff in *Loveladies* had similarly argued that the relevant parcel should be limited to the property for which the permit was requested, but the Federal Circuit rejected that argument in favor of a case-specific factual analysis. The District of Columbia Circuit did the same thing in *District Intown Properties*. 198 F.3d at 880, *et seq.*

In *District Intown Properties* the district court had concluded that the relevant parcel included the apartment lot as well as the lawn lots. On appeal, the circuit court agreed, acknowledging with approval the case-specific factual analysis the district court had applied:

> The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. [citation omitted] An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases. [citations omitted]

198 F.3d at 880. The court further noted that the apartment and lawn properties were spatially and functionally contiguous and had been treated by District Intown as a single indivisible property for more than 25 years.

The court in *District Intown Properties* expressly addressed the decision in *Loveladies*, noting, *inter alia*, *Loveladies* emphasis on a "flexible approach, designed to account for factual nuances." 198 F.3d at 881. The court

concluded that in light of the factual circumstances of each case, the cases were consistent. *Id.*

Another Federal Circuit case, not cited by Petitioners, further undermines their argument that there is a conflict between the Federal and District of Columbia Circuits. *See Forest Properties, Inc. v. U.S.*, 177 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 951 (1999). The *Forest Properties* case belies Petitioners' argument that the Federal Circuit prohibits aggregation in determining the relevant parcel. Rather, *Forest Properties* applied the same case-specific factual analysis as *Loveladies* and *Palm Beach Isles* (and *District Intown Properties*, as well), stating that "[o]ur precedent displays a flexible approach, designed to account for factual nuances." *Id.* at 1365. The court said that this "requires courts to focus on the expectations of the claimant with regard to the property," and "[w]here the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel." *Id.* Here, the court said, it was understood from the beginning that "the two portions would be developed as a single unit." *Id.*

Other lower federal courts have applied a nearly identical analysis. In *Ciampitti v. United States*, 22 Cl.Ct. 310, 318-319 (1991), for example, the Court of Federal Claims discussed the determination of the relevant parcel in similar terms of case-specific factual analysis:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of the remaining lands, and no doubt many others, would enter the calculus.

In summary, the Federal Circuit and the District of Columbia Circuit have both determined the relevant parcel by a nearly identical case-specific factual analysis "designed to account for factual nuances." Petitioners have failed to demonstrate that there is any conflict among the circuits.

C. The State Court Cases Cited By Petitioner Are Not In Conflict

Petitioners' assertion that there is a conflict among the state courts with respect to the relevant parcel in takings cases is based on the same erroneous premise. That is, Petitioners again mistakenly assume that there is a conflict if all the cases do not uniformly result in either aggregation or non-aggregation of related properties, when in fact no such result should be expected from a case-specific factual analysis. The state court cases, like those of this Court and the federal circuit courts, routinely apply just such a case-specific factual analysis, as reflected in the cases Petitioners have cited.

For example, citing to the various factual considerations set forth in *Ciampitti, supra*, the Supreme Court of Michigan has stated that "[d]etermining the size of the denominator parcel is inherently a factual inquiry." *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 536 (Mich. 1998). A similar factual analysis was made in *Karam v. Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998). There the court noted that although contiguous commonly-owned acreage is often treated as a single parcel for takings analysis, factual examination may result in treating the property as separate parcels. The court cited various cases involving large tracts of acreage that had been segmented into smaller parcels for development at different times, where "either because of the configuration of the property or its history, the divided parcels [were] considered as separate and distinct entities or units." 705 A.2d at 1228. The court discussed various factual issues in the case before it and concluded that, "*[r]ecognizing the fact-sensitive question before us*, we are convinced that the adjoining upland and riparian lands must be considered a single property unit." *Id.* (Emphasis added.)

The Supreme Court of Ohio case cited by Petitioners adopted the same approach:

> Although contiguous tracts of property are typically considered as a single relevant parcel for purposes of a takings analysis, factual nuances may dictate a more flexible approach. . . . These factual nuances may include the claimant's investment-backed expectations.

State ex. Rel. R.T.G., Inc. v. State of Ohio, 780 N.E.2d 998, 1009 (Ohio 2002) (citations omitted). The California cases cited by Petitioners also applied the same case-specific factual analysis to determine the relevant parcel in takings cases. In *Twain Harte Associates, Ltd. v. County of Tuolumne*, 265 Cal.Rptr. 737, 745 (Cal. App. 1990), the court stated that "it seems obvious the question of whether two related parcels will be treated as one . . . [is] necessarily bound up in the 'ad hoc factual' [citation omitted] evaluation which constitutes the test for determining a 'taking.'" *See also Aptos Seascape Corp. v. County of Santa Cruz*, 188 Cal.Rptr. 191, 197 (Cal. App. 1982) (adopting as the "appropriate" approach that determining whether there are two separate parcels for taking purposes is a question of fact). The Supreme Court of Colorado, in *Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001), examined the impact of a county land use plan that regulated all of the plaintiff's property but restricted the use of only part of it. The court rejected the plaintiff's argument that the relevant parcel was only the restricted portion: "Were we to accept [plaintiff's] position that a court should evaluate the effect of a regulation with respect to only one segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough." *Id.* at 69.[5]

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[5] The Oregon cases add nothing. *See Coast Range Conifers, LLC v. State of Oregon*, 76 P.3d 1148, 1157-58 (Or. App. 2003) (Oregon Supreme Court has "never explained" relevant parcel rationale, and Oregon does not presume same interpretations of federal and state constitutions).

Petitioners assert that the "decision below deepens the confusion among the state courts." Pet. at 21. In fact, the Illinois Court of Appeals followed the exact same, factually oriented reasoning of the federal and state courts discussed above. The court stated:

> [I]n *District Intown Properties*, the court applied such factors as the degree of contiguity, the dates of acquisition, the extent to which the parcel had been treated as a single unit, and the extent to which the restricted lots benefitted the unregulated lot. [citation omitted]

Pet. App. at A-18. The court then examined the facts of the case within that context. *Id.* at A-19. The court noted that Petitioners' complaint indicated that they had purchased the Property as a single unit at one time, and that the two lots had been in contiguous ownership since Petitioners bought them in 1968. Pet. App. A-19. The court further noted that Petitioners had admitted before the ZBA that they could not have purchased the lots separately because of the Ordinance, which was in effect at the time the Property was purchased, that they paid a single price of $45,000 for the entire Property, and that "the lot they now assert should be treated separately could not legally have been built upon as a separate lot either at the time they purchased the Property or at present." *Id.*

Examining the Ordinance, the court first found it to be facially valid. The court observed that Petitioners did not dispute that the City has legitimate interests at stake, in the form of minimum lot area requirements. Pet. App. A-26. The court stated that, "[m]oreover, we find that a sufficient nexus exists between reducing density and providing the contiguous ownership regulation to prevent construction on lots of substandard size." *Id.* After finding the Ordinance facially valid, the court, in a detailed analysis, held that the Ordinance was valid as applied to Petitioners. Pet. App. A-21-27.

Petitioners, in contrast, rely on the dissenting opinion below, which is clearly contrary to the decisions of this Court.

The dissent simply concluded that the "proper approach is to recognize, as does the City's zoning ordinance, the lot line dividing plaintiffs' property and to define the relevant property for takings purposes simply as the [substandard] lot." Pet. App. A-36 (O'Malley, J., dissenting). However, if there is one thing that this Court has made absolutely clear regarding the relevant parcel, it is that the relevant parcel is not simply the restricted area defined by the regulation:

> [D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban. . . .

Tahoe, 535 U.S. at 331.

Petitioners are incorrect in asserting that there is a conflict among the state courts.

III. THE PRESENT CASE IS NOT, IN ANY EVENT, AN APPROPRIATE CASE FOR THIS COURT TO FURTHER ADDRESS ISSUES RELATING TO THE DETERMINATION OF THE RELEVANT PARCEL IN TAKINGS CASES

The circumstances of this case would not offer an appropriate vehicle for the Court to provide significant guidance with regard to the determination of the relevant parcel in takings cases.

A. The Present Case Does Not Involve Vertical or Temporal Restrictions on Uses

Members of the Court have sometimes suggested a concern about the proper analysis to be used in determining the relevant parcel when a regulation restricts, in a vertical or temporal context, one strand of a "bundle of rights," such as subsurface mining rights, *Lucas*, 505 U.S. at 1016, fn. 7 (SCALIA, J., in dicta characterizing *Pennsylvania Coal* and *Keystone Bituminous Coal* as "inconsistent pronouncements by the Court"); air rights of landmarked buildings, *Penn*

Central, 438 U.S. at 138 (REHNQUIST, C.J., and STEVENS, J., dissenting); and temporary restrictions on construction, *Tahoe*, 535 U.S. at 343 (REHNQUIST, C.J., SCALIA, J., and THOMAS, J., dissenting).

The present case involves none of these circumstances. To the extent that it involves any issue of relevant parcel at all, it relates only to the horizontal boundaries of the parcel. But even in that regard, this case does not provide a framework for the Court to offer useful guidance to the courts below.

B. The Present Case Does Not Involve Circumstances Typical of Those In Which There Is a Question of Whether to Aggregate Commonly Owned Parcels

Petitioners assert that if the non-conforming, but separately platted, rear lot within the Property were deemed to be the relevant parcel for takings analysis, then the denial of a variance to build on that lot would constitute a taking. But, as the following discussion shows, there is no justification for making such a determination, and the circumstances involved here do not provide a framework within which to offer guidance to lower courts in the general context of how a relevant parcel should be determined.

1. There Is No Prohibition Here of the Use of *Any* Part of Petitioners' Property

In a typical regulatory takings case there is either a partial limitation on the use of all of the property, such as a limitation to only residential use, or a complete restriction on some limited portion of the property, such as a set-back area within which construction is prohibited. In contrast, in the present case the Ordinance does not preclude the development of *any* part of Petitioners' Property. They may build anywhere on the Property – on the front lot or on the back lot or on both lots together. The only restriction is that because

each lot standing alone would be substandard and nonconforming with regard to the minimum lot size, they must utilize the two lots together and cannot build separately and independently on each substandard lot.

Petitioners contend that because they already have a house on the front lot of the Property, the denial of a variance to build on the rear lot prevents their use of the rear lot. However, it is Petitioners themselves who have elected to use the Property as they have and not build on the rear lot. As stated above, Petitioners are free to build on any part of the Property, including the rear lot, and they have elected to have a house on the front lot. They could tear down that house and build a new house anywhere on the Property, including the rear lot, or they could, within zoning requirements, expand their existing house onto the rear lot as well as the front lot. But there is nothing that precludes construction on any part of their Property.

2. The Prohibition on Separating Commonly-Owned Contiguous Lots to Create New, Isolated, Substandard Lots Is a Well-Established Zoning Principle

The present case is also different from the usual takings case in which there is a relevant parcel issue because the regulation involved here is such an integral part of accepted zoning practice. In the usual regulatory takings case in which the relevant parcel comes into play, the use of certain property is restricted and the court must examine numerous factual considerations regarding the contiguous property owned by the plaintiffs to determine how much of it should logically be included in analyzing the takings claim. In contrast, in the present case the Petitioners are challenging a zoning regulation that is in widespread use, and the legitimacy of which has been repeatedly upheld by courts, across the country.

Respondents recognize that the mere fact that a particular regulation is a legitimate exercise of the police power does

not automatically shield the regulation from a taking challenge. *See Lucas*, 505 U.S. at 1020, *et seq.* (lower court's finding of legitimate exercise of police power did not preclude takings claim where regulation eliminated all economically viable use of the property). Nevertheless, the Court has repeatedly emphasized that the purpose of the regulation is a significant factor in determining whether there has been a taking. *Penn Central*, 438 U.S. at 124 ("[T]he character of the governmental action is a factor." A taking is less likely "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good"); *Agins*, 447 U.S. at 261 ("The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate"); *Tahoe*, 535 U.S. at 337 ("moratoria like [the regulations involved here] are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy"); *Keystone Bituminous*, 480 U.S. at 485 ("the government action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare"); *Palozzolo*, 533 U.S. at 617 (factors that must be considered include "the character of the government action").

Minimum lot area regulations have long been a staple of municipal zoning schemes and have been recognized as a proper exercise of local zoning power. *See generally American Law of Zoning* § 9.64 at 310-13. These regulations serve a municipality's legitimate interest in maintaining uniformity and symmetry in the development of the municipality or a particular neighborhood. *See, e.g., id.* at 310 ("Reasonable area restrictions control density, reduce congestion, and prevent undue concentration of population.")

Minimum lot area regulations are sometimes waived when they pose the risk of saddling land owners with isolated, substandard lots that cannot be developed. *American*

Law of Zoning § 9.66. In the present case, the Ordinance recognizes this potential problem, but provides that no exception or waiver is generally available when two or more commonly-owned, contiguous lots can be aggregated to meet the City's minimum lot area standards.

This "merger" provision is typical of the manner in which municipalities address substandard, but commonly owned, lots. *See American Law of Zoning* § 9.67 at 325-26 ("Under [the exception for prior-owned substandard lots] an owner is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception"). *See also, e.g., Skelley v. Zoning Board of Review of the Town of South Kingston*, 569 A.2d 1054, 1056-57 (R.I. 1990) ("The concept of merger of contiguous nonconforming lots is gaining increased recognition"); *Asack v. Board of Appeals of Westwood*, 716 N.E.2d 135, 137 (Mass. App. 1999) ("adjoining parcels held in common ownership are generally considered one lot for zoning purposes"). Because the City's treatment of commonly owned substandard lots is prevalent, Petitioners' taking argument, *i.e.*, that development restrictions on commonly-owned contiguous lots are – categorically – a taking, calls into question the legislative choices of many other cities and towns and threatens to upset the settled expectations of both municipalities and their residents.

Petitioners' proposed usurpation of local zoning control is unnecessary to promote "fairness" because the current municipal distinctions are not unfair or irrational. The distinction between commonly-owned substandard parcels and separately-owned substandard parcels is not only well enshrined in zoning law, it has an obvious and rational purpose. Prohibiting development on a stand-alone parcel works a greater hardship on the parcel's owner, as the owner's choices are limited to sale of the parcel or purchase of a neighboring parcel. The potential hardship is not of the same kind or magnitude where the owner has the unilateral ability to combine parcels so as to meet the municipality's minimum

development requirements and, thereafter, the ability to develop the unified parcel as she sees fit. *See American Law of Zoning* § 9.67 at 327 ("The requirement that substandard lots be combined may be regarded as imposing no unnecessary hardship"). *See also, e.g., Sibley v. Inhabitants of the Town of Wells*, 462 A.2d 27, 30-31 (Me. 1983) (ownership of contiguous lots and ability to combine lots eliminates the hardship that a stand-alone owner would suffer); *Asack*, 716 N.E.2d at 137-38 (common owner of adjoining lots has the ability to minimize nonconformity); *Graham v. Itasca County Planning Commission*, 601 N.W.2d 461, 466 (Minn. App. 1999) (distinction between common and independently owned parcels is rational because common owners have greater ability to comply with underlying requirements); *Tekoa Construction, Inc. v. City of Seattle*, 781 P.2d 1324, 1328 (Wash. App. 1989) (common ownership distinction is rationally related to the city's legitimate interest in maintaining character of neighborhoods); *Klehr v. Zoning Board of Appeals of Village of Skokie*, 320 N.E.2d 498, 502 (Ill. App. 1974) (common ownership distinction upheld).

Unlike the stand-alone owner, the common owner has the ability to combine land and create a properly sized, conforming lot. The ability to aggregate and conform gives an owner increased flexibility to develop the conforming parcel. In this scenario, the unimproved lot is not an "economically idled" "appendage," *see* Pet. at 23, but an integral contributor to the value of the parcel as a whole. *See, e.g., Skelley*, 569 A.2d at 1058 (the merger of an unimproved lot with an improved lot increases the value of the improved lot and provides additional options for expansion of the primary home).[6] Indeed, with specific respect to Petitioners, the Illinois Court of Appeals upheld

[6] Under the City's Zoning Code, the increased area of the combined lots gives Petitioners the ability to construct a larger house than could be built on either divided lot, thereby providing added value.

the determination that the unified lot has increased 20 fold in value since the purchase in 1968. Pet. App. A-8. As this experience demonstrates, neither the general practice of requiring owners to merge non-conforming lots to meet minimum lot size standards, nor the specific application of the Ordinance to Petitioners' Property, results in fundamental unfairness that the Court need address.

In *Penn Central*, the Court stated that "in instances in which a state tribunal reasonably concluded that 'health, safety, morals, or general welfare' would be promoted by prohibiting particular uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests. [citations omitted]." 438 U.S. at 125, 98 S.Ct. at 2659. Here, state tribunals have repeatedly upheld the legitimacy of the kind of ordinance being challenged in the present case. Moreover, because this well-established land-use regulation does not prohibit development of any part of a property owner's substandard lot, it does not destroy or significantly adversely affect his property interests.

Despite insisting that the Court must decide how relevant parcels are to be determined, Petitioners offer no suggestion how this case might provide further guidance. By their erroneous argument that the absence of uniform aggregation or non-aggregation reflects a conflict among the lower courts, Petitioners implicitly reject a case-specific factual approach. Instead, Petitioners simply argue that the Court should overturn the established jurisprudence discussed above and hold unconstitutional zoning ordinances that preclude separation of contiguously owned substandard lots. Petitioners are in effect asking the Court to establish a *per se* rule that defines the relevant parcel as the property subject to the regulatory restriction – *i.e.*, in this case the substandard lot. But, as discussed above, this Court and federal circuit courts have already repeatedly and consistently rejected the notion of a *per se* rule defining the relevant parcel simply as the property subject to the regulatory

restriction – an approach that would make virtually every regulation a taking. *See, e.g., Tahoe*, 535 U.S. at 331 ("defining the property interest taken in terms of the very regulation being challenged is circular. * * * We have consistently rejected such an approach to the 'denominator' question"); *accord Loveladies*, 28 F.3d at 1181; *District Intown Properties*, 198 F.3d at 880, *et seq.* The Court having stated that principle several times, and the lower courts having followed that principle, it hardly needs to be repeated again, particularly when the court below properly followed that principle here.

In summary, the present case does not involve factual circumstances typical of those in which the courts must make difficult choices about what constitutes the relevant parcel for purposes of analyzing a takings claim. Consequently, this case does not provide a vehicle for the Court to further develop guidelines for the determination of the relevant parcel.

CONCLUSION

For the reasons stated above, the Petition for A Writ of Certiorari should be denied.

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In the
Supreme Court of the United States

ESTHER P. EMMERMAN and
RONALD Z. EMMERMAN,

Petitioners,

v.

THE CITY OF HIGHLAND PARK, et al.,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a property aggregation ordinance alone defeat a claim that a city has stripped a separately platted and independently developable plot of land of all economically beneficial use to create public open space, thus causing an unconstitutional taking of property, by requiring that the economically idled plot be treated as an appendage of a valuable, contiguous area of land?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Esther P. Emmerman and Ronald Z. Emmerman (Emmermans) respectfully file this reply to Respondent City of Highland Park's Opposition to the Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Respondents' opposition fails to appreciate the nationally important issue of federal takings law raised by the decision below and the federal conflicts that require this Court's intervention.

ARGUMENT

I

THIS CASE RAISES AN IMPORTANT ISSUE OF TAKINGS LAW ON WHICH FEDERAL COURTS CONFLICT, THE RESOLUTION OF WHICH IS NECESSARY BEFORE COURTS CAN APPLY *PENN CENTRAL*'S AD HOC FACTUAL INQUIRY OR ANY OTHER TAKINGS STANDARD

Respondents' opposition mistakenly argues that this case fails to raise an important federal issue or conflict in questioning the circumstances under which courts may aggregate an area of regulated land with a contiguous area prior to determining if the regulation has taken private property. Opp. at 11.

A. The Petition Raises a Significant Issue of Takings Law and This Case Is an Appropriate Vehicle for Resolution of That Issue

1. This Court Has Never Directly Addressed the Relevant Land Parcel Problem, Much Less Indicated That It Is To Be Solved by Tests Designed To Determine if a Regulatory Taking Occurred

Respondents' opposition suggests that the issue of how to determine the relevant land parcel for takings analysis has already been settled, *sub silencio,* by this Court's articulation of a three-part ad hoc takings test in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (regulatory takings analysis guided by inquiry into the economic impact of regulation, the extent to which the regulation has frustrated investment-backed expectations and the "character of the governmental action"). *See* Opp. at 11-14. This position conflates the inquiry into whether there is liability for a regulatory taking with the inquiry into the nature of the property subject to liability analysis.

The inquiry into the property interest subject to takings scrutiny is distinct from, and precedes, the issue of whether there is liability for a taking. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987). Indeed, a court cannot even begin to inquire into whether there is liability for a taking until it resolves the question of the property interest at issue. *Id.* at 498 (determining relevant parcel of coal interests before applying *Penn Central* takings test). The factually-based takings test articulated in *Penn Central* was not designed to resolve, and was not used by the *Penn Central* Court to resolve, the critical initial issue of the relevant property interest. The case-specific *Penn Central* takings test simply addressed "[t]he question of what constitutes a 'taking' for

purposes of the Fifth Amendment." *Penn Central*, 438 U.S. at 123. Thus, *Penn Central*'s ad hoc takings test depends on and follows, rather than governs, the separate inquiry into the nature of the relevant property interest. *See District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999) ("Under both *Lucas* and *Penn Central*, then, we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel.").

While recognizing the extent to which issues of takings liability hinge on the issue of the relevant property, this Court has acknowledged that it has not provided meaningful guidance on the relevant property issue. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *see also Keystone*, 480 U.S. at 497. The lack of guidance is especially pronounced in cases where an area of regulated land lies contiguous to another area in common ownership; i.e., where, the horizontal boundaries of the relevant takings parcel are unclear. *Lucas*, 505 U.S. at 1016 n.7.

The parties agree that the ultimate goal in addressing the unresolved relevant land parcel issue is to define the "parcel as a whole." But, significantly, even Respondents recognize that "reference to the 'parcel as a whole' and the 'property in its entirety' *does not . . . resolve the specific factual question of what constitutes the whole parcel.*" Opp. at 13 (emphasis added). While this Court has repeatedly indicated a desire to clarify the specific "whole" parcel issue in the context of contiguous land, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (noting Court's "discomfort" with the undefined "whole parcel" principle in horizontal land context), it has not yet done so.

The Emmermans do not contend that the Court should take this case to establish some "per-se" rule that "will either *always* result in commonly owned properties being aggregated . . . or *always* result in commonly owned properties not being

aggregated." Opp. at 10. The Emmermans agree that such a per se rule is not desirable. The Emmermans do, however, respectfully suggest that some guidance beyond the indeterminate "parcel as a whole" principle is necessary and overdue in the context of contiguous land. Petitioners' Appendix (Pet. App.) at 10-14. They specifically contend that a legal lot of record that is separately platted and independently developable must be presumed to be a constitutionally distinct area of property for takings analysis and that it takes more than an ordinance to defeat this presumption.

2. This Case Will Not Invalidate Laws Requiring Contiguous Nonconforming Lots To Be Treated as a Single Lot for Zoning Purposes

Respondents argue that this case threatens the validity of ordinances requiring legal lots of record to be treated as one unit for zoning purposes. Opp. at 27. This fear betrays a misconception about the nature of the issue at hand.

The issue presented is whether an ordinance requiring a vacant legal lot of record to be aggregated with a contiguous lot for zoning purposes can by itself compel aggregation of the lots for purposes of regulatory takings analysis. The Emmermans position is that government cannot combine a regulated, independently developable legal lot of record with contiguous land, and so defeat a takings claim, simply by passing an ordinance. To the extent that the ordinance in this case is typical, and the Emmermans agree that is not uncommon for local governments to enact similar measures, the same principles would apply. That is, when the owner of a contiguous legal lot of record subject to a property aggregation ordinance receives a final decision denying all or substantially all development of the lot, thus ripening a taking claim, the ordinance cannot by itself aggregate the owner's lots for takings analysis.

The Emmermans' challenge would impose limits on the government's ability to avoid the duty to compensate for taking property merely by passing laws that define away property rights. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (The "State, by ipse dixit, may not transform private property into public property without compensation."). But it would hardly invalidate common non-conforming, contiguous lot aggregation ordinances. Local governments would remain free to enact such ordinances for local *zoning* purposes. They would, however, not be able to rely on the ordinances alone to aggregate independently developable contiguous legal lots of record for *constitutional* purposes.

Nor, as previously discussed, is there any danger that this case will categorically preclude aggregation of contiguous lots for takings purposes. It would simply require the government to rely on grounds beyond an aggregation ordinance to defeat the presumption that legally subdivided and independently developable lots of record are also distinct units for takings analysis. Ultimately, it will provide much needed guidance on the critical unresolved issue of how courts are to identify the relevant takings parcel when faced with contiguous areas of land.

B. Federal Courts Are in Conflict in Principle and Result on the Issue of Whether Independently Developable and Separately Divided Land Can Be Aggregated for Takings Analysis

Respondents argue that there are no federal conflicts on the issue of the aggregating contiguous land for takings analysis because, although courts have arrived at divergent outcomes, they have consistently engaged in a rule-deficient fact-based inquiry in so doing. Opp. at 19. Such a pattern supports Petitioners' contention that lower courts are in need of further

guidance on the criteria for determining whether to aggregate contiguous land. In any event, Respondents' argument proves too much. Under the logic of that argument, reviewable federal conflicts will rarely, if ever, occur because even patently contradictory judicial decisions can be reconciled on the ground that they were fact specific.

The test for conflict is whether courts apply different principles in considering the legal import of similar facts and arrive at different outcomes in relatively similar factual settings. On the relevant land parcel issue, particularly on the issue of whether legally and developmentally independent land should be aggregated, federal courts are in conflict in principle and in result.

As one example, the Federal Circuit Court of Appeals and Court of Appeals for the District of Columbia have applied different principles to arrive at different results in considering whether a severely restricted area of legally and developmentally independent land should be aggregated with a contiguous area of land for purposes of takings analysis. Compare *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), and *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), with *District Intown Properties Limited Partnership*, 198 F.3d at 880. In *Palm Beach Isles*, the Federal Circuit excluded from the relevant parcel 261 acres of land that had been sold and developed before application of regulations restricting the owner's remaining 50 or so contiguous acres; only the 50 acres were considered for the regulatory takings analysis. 208 F.3d at 1381. In so doing, the Federal Circuit focused on the legal and developmental independence of the two areas of land. *Id.* (stressing that development of the 261 acres was "temporally remote" from the owner's attempt to develop the remaining, restricted 50 acres of land, and that the two areas of land were "legally unconnected").

In *District Intown* on the other hand, the D.C. Circuit concluded that a parcel of land that had been developed as an apartment building *should* be aggregated with a restricted and separately divided area of contiguous land for takings analysis. 198 F.3d at 880. Unlike the Federal Circuit, the D.C. Circuit did not focus on the degree of legal connection between the parcels or the fact that the development of one of the parcels was "temporally remote" from the landowner's attempt to use the restricted contiguous area. *Id.*

The fact that both the Federal Circuit and D.C. Circuit purport to apply a fact-specific inquiry to resolve the relevant parcel issue does not diminish their inconsistency on whether and on what basis legally and developmentally independent areas of contiguous land should be aggregated for takings analysis. This Court should grant the Petition to give the lower courts guidance on the circumstances and principles under which legally distinct areas of land can be aggregated for takings analysis.

II

THE LOWER COURT'S DETERMINATION THAT AN ORDINANCE AGGREGATED THE EMMERMANS' TWO LEGAL LOTS OF RECORD FOR TAKINGS ANALYSIS DOES NOT COMPORT WITH FAIRNESS AND JUSTICE

Respondents' opposition argues that the Emmermans have not suffered any injustice by the lower court's decision aggregating their two legal lots of record for takings analysis. Opp. at 4. In so doing, Respondents mischaracterize some of the pertinent facts in this case.

The Emmermans acquired two separately platted lots in an established residential subdivision in 1968 for the amount of $45,000. Pet. App. at A-3. But, contrary to Respondents'

contentions, the Emmermans apportioned this sum between the two lots, considering $25,000 as the price for one lot and $20,000 for the other.[1] Pet. App. at A-7-A-8. Although both lots were considered nonconforming because they were smaller than allowable under the building code, the City had already permitted a home on one lot. Pet. App. at A-3.

Between the time the lots were acquired and 2001, many other property owners in the subdivision were permitted to build homes on lots that are the same size or smaller than the Emmermans' vacant lot. Respondents argue that, in making this assertion, the Emmermans are ignoring zoning lines. In this way, Respondents imply that only undersized lots in a different zoning district from the Emmermans' have been developed. This is not the case: the City has allowed residential development of lots the same size or smaller than the Emmermans' *both within the same zoning district as the Emmermans'*, and across the street in a different zoning district. *See* Pet. App. at A-30 (lower court recognizing that it had to accept as true the Emmermans' allegations that the City permitted "others to build on undersized lots in the same neighborhood or [zoning] district").

The Emmermans have never built anything on their vacant lot, physically used it in any way as a "backyard" or appendage of their developed lot, or had their lots formally merged into a single lot of record. Their vacant lot is a distinct, legal residential lot of record. It is the only undeveloped nonconforming lot out of the many nonconforming lots in their zoning district and in the residential subdivision. Pet. App. at A-37 (O'Malley, J., dissenting).

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[1] The lower court recognized that "[t]he claim that Ronald [Emmerman] apportioned $20,000 of the purchase price for the vacant lot and that his testimony was uncontroverted is an issue of credibility and weight, which we may not review." Pet. App. at A-8.

The City denied the Emmermans' application to build a home on the vacant lot because the lot provided open space and, so, served a public purpose. Pet. App. at A-3. When the Emmermans sought just compensation, the Illinois courts agreed with the City that the Emmermans' separately platted and independently developable vacant lot had to be combined with their valuable contiguous lot for takings analysis because an ordinance required the lots to be "used" and "managed" as "one zoning lot."[2] Pet. App. at A-19.

The situation would be entirely different if the Emmermans' vacant lot was an "individual, isolated non-conforming lot that fails to meet the minimum lot size requirement," instead of contiguous to a second non-conforming lot. First, the City code allows such an isolated lot to be developed. Opp. at 5. Second, such a lot would be presumed to be the relevant parcel in a takings challenge, giving rise to a strong claim to just compensation if it were economically idled. *See, e.g.*, *Harrington Glen, Inc. v. Leonia Board of Adjustment*, 243 A.2d 233 (1968) (denial of variance to build on an undersized lot amount to a taking), *Town of Beverly Shores v. Bagnall*, 570 N.E.2d 1363 (Ind. Ct. App. 1991) (denial of variance to build a home on undersized lot caused a taking). But, because the Emmermans own an adjoining lot, the City's contiguous lot aggregation ordinance denies them the ability to build a home on their vacant lot and, under the lower court's rationale, requires their separately

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[2] In combining the Emmermans' lots into a "unitary parcel," the lower court stressed that the Emmermans had purchased their lots "as a single unit at one time," held the lots "in contiguous ownership since [they] bought them." Pet. App. at A-19. All of these actions were mandated by the City's property aggregation ordinance, which required contiguous nonconforming lots to be "maintained," "used," and therefore, transferred, as one zoning lot. Pet. at 4, 5; Pet. App. at 19.

platted, legal lots of record to be combined into a "unitary [takings] parcel" that defeats their takings claim.

This outcome cannot be reconciled with basic principles of fairness. At the least, those principles require that owners of functionally and physically identical properties have similar rights under the Constitution. *Cf. Palazzolo v. Rhode Island*, 533 U.S at 634 (O'Connor, J., concurring) (explaining that "the nature and extent" development permitted to others "vis-a-vis the development sought by the claimant" helps determine rights to compensation); *Palazzolo*, 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others."). In this case, fairness requires that the owners of contiguous, separately platted, and independently developable lots share the presumption, enjoyed by owners of isolated lots, that such lots are single units for takings analysis. And the government cannot defeat these principles of equity simply by passing a law. *Cf. Palazzolo*, 533 U.S. at 626.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: October, 2004.

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No. 04-242

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In the

Supreme Court of the United States

ESTER P. EMMERMAN AND RONALD Z. EMMERMAN

Petitioners,

v.

CITY OF HIGHLAND PARK, ILLINOIS, ET AL.

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS ESTER P. EMMERMAN AND RONALD Z. EMMERMAN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37(b), the National Association of Home Builders respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners Ester and Ronald Emmerman. Written consent for amicus participation in this case was withheld by Respondent City of Highland Park. Written consent was granted by counsel of record for Petitioners.

INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") represents over 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members under the Fifth Amendment when land use regulators take private property for public use without the payment of just compensation.

NAHB, whose members are highly dependent on land use decisions made by government bodies, has appeared before this Court as amicus curiae, of counsel, or a party in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512

U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

For these reasons, the motion of National Association of Home Builders to file a brief amicus curiae should be granted.

DATED: October, 2004.

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National Association of Home Builders respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Petitioners Ester and Ronald Emmerman on August 19, 2004.[1]

I. SUMMARY OF ARGUMENT

The case below presents the Court with an opportunity to clarify an open question in its takings jurisprudence: how should lower courts define the relevant parcel of land for the purpose of determining whether a government regulation has effected a compensable regulatory taking under the Fifth Amendment. Given the confusion and conflicting views of this question in the lower courts, the Court should grant the petition to clarify the manner in which courts should determine the relevant parcel.

II. ARGUMENT

In 1992, this Court confronted a landmark property case and held that a South Carolina beachfront building restriction amounted to a compensable regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Although the owner of land retained title, the Court recognized that the "regulation denie[d] all economically beneficial or productive use of the land," amounting to the functional equivalent of a physical taking. *Id.* at 1015. This principle was based upon Justice Holmes' oft-quoted assertion that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a

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[1] In accordance with Rule 37.6, Amicus Curiae confirms that this brief was not written by counsel for any party in this matter and that no person or entity made a monetary contribution specifically for the preparation of this brief.

taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The *Lucas* Court recognized that "[its] decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far,'" *Lucas*, 505 U.S. at 1015, but it did not need to provide a more precise definition because the trial court found that the regulation in question "left each of Lucas' beachfront lots without economic value." *Id.* at 1016 n.7. The Court held that "on numerous occasions" its decisions had established that "categorical treatment [is] appropriate ... where regulation denies *all* economically beneficial or productive use of land." *Id.* at 1015-16 (emphasis added).

A. The Relevant Parcel Issue

At the same time, the *Lucas* Court admitted that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 1016 n.7. Indeed, this "relevant parcel" question is a crucial threshold issue for all takings analyses, but it has received little judicial attention in comparison to the question of how a regulation affects the economic uses of a parcel. The relevant parcel is the denominator in the takings fraction, so any comparison of before and after values necessarily hinges on a uniform method of determining the relevant parcel. Otherwise, the court finds itself in the same position as a grade school child trying to add fractions with different denominators: without a common denominator, the calculation is impossible. As the *Lucas* Court recognized, however, the relevant parcel issue remains "unclear." *Id.* Indeed, "this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court," further muddying the water. *Id.*

The *Lucas* Court was able to sidestep the relevant parcel question because it was irrelevant to the disposition of that case: the numerator was zero (because the regulation denied all economically viable use), so the value of the takings fraction was the same regardless of the denominator. Still, the issue looms large, and each passing year sees greater conflict in takings jurisprudence as lower courts struggle to make sense of contradictory precedent from this Court. These courts have criticized *Lucas* not for its holding but because this Court missed "a much-heralded opportunity to clarify how courts were to balance public interest claims against liberty claims of private property owners..." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178 (Fed. Cir. 1994); *see also District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 887-888 (D.C. Cir. 1999) (Williams, J., concurring).

To protect and preserve property rights, "[s]tate and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." *Planned Parenthood v. Casey*, 505 U.S. 833, 845 (1992). This case, by highlighting the relevant parcel question, provides the Court with an ideal opportunity to answer the lower courts' requests for guidance and clarify a vexatious issue in property law. A clear relevant parcel precedent would resolve conflict among lower courts while advancing the interest of judicial economy by giving litigants a dependable and reliable standard by which to judge their dispute. Therefore, this Court should grant certiorari.

B. This Court's Relevant Parcel Jurisprudence Has Produced More Questions Than Answers

1. Conflicting Answers to the Relevant Parcel Question: *Mahon* and *Keystone*

The first major regulatory taking case was *Mahon*, in which Justice Holmes made his famous assertion that a regulation that "goes too far" violates the Takings Clause. 260 U.S. at 415. In this case, the Pennsylvania Coal Company appealed an injunction that prevented it from coal mining that would have caused subsidence on the plaintiffs' property. Although the plaintiffs owned only the surface rights to the property, the Kohler Act in Pennsylvania restricted the company's ability to exercise its mining rights under the property by requiring it to leave intact enough subterranean support to keep the mines from collapsing and causing subsidence on the surface. The company argued that the Kohler Act as applied amounted to a taking of the coal left in the ground as support, violating the Fifth Amendment's Takings Clause. Despite the "public interest" furthered by the Kohler Act, the Court struck it down, holding that "[t]o make it commercially impracticably to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Implicitly, then, the Court reached this decision by defining the relevant parcel narrowly: the regulation was invalid because it prohibited all economic use of the "certain coal" that could not be mined, despite the fact that the company could still mine other coal on its property.

Over half a century later, this Court considered an almost-identical question, and it reached the opposite conclusion. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Quoting Justice Holmes' admission that "the question depends upon the

particular facts," *Mahon*, 260 U.S. at 413, the *Keystone* Court ignored the logic of *Mahon* because now it was "address[ing] a different set of particular facts' ..." *Keystone*, 480 U.S. at 474. Like *Mahon*, however, the central issue in *Keystone* was whether a Pennsylvania law requiring coal mining companies to leave enough support in the ground to prevent subsidence was a regulatory taking. Unlike *Mahon*, the *Keystone* Court found that no compensable taking. This outcome depended entirely on the *Keystone* Court's definition of the relevant parcel:

> The 27 million tons of coal [that must be left in the ground as support] do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. ... There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

Id. at 496-97.

Remarkably, the Court reached this determination despite its recognition that "Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate." *Id.* at 497-98. This would seem to strengthen the *Mahon* argument that only the support estate should be considered the relevant parcel, but the Court nevertheless chose to aggregate the support and mineral estates and consider them together as one relevant parcel. It explicitly refused to let "the result turn on whether state law allowed the separate sale of the segment[s] of property." *Id.* at 498.

In dissent, Chief Justice Rehnquist criticized this approach. He underlined the contradictions between the *Keystone* majority opinion and the *Mahon* decision, rejecting the majority's insistence that the particular facts in *Keystone* justified the dramatically different result. *See id.* at 518-520 (Rehnquist, C. J., dissenting). Although he acknowledged that defining the relevant parcel was an "admittedly difficult task," *id.* at 514, the Chief Justice insisted that traditionally the Court "evaluated takings claims by reference to the units of property defined by state law." *Id.* at 518-19. Under his reading of the Court's precedent, "where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest." *Id.* at 520. Therefore, Chief Justice Rehnquist advocated defining the relevant parcel narrowly, as the *Mahon* Court had done, and finding that a compensable taking had occurred.

2. Making Sense of the Contradiction: *Penn Central* and *Andrus*

Although the factual similarities between *Keystone* and *Mahon* highlight this Court's divergent approaches to the relevant parcel question, what is most notable about the decisions is that the *Keystone* Court took great care to reaffirm *Mahon* and cast its decision squarely within the *Mahon* precedent. *Id.* at 474. Both approaches remain good law, and lower courts are left to decide whether to define relevant parcel broadly (as in *Keystone*) or narrowly (as in *Mahon*) by attempting to divine the factual differences cited, but not enumerated, by the *Keystone* Court.

Indeed, *Keystone* may best be read as the logical extension of another regulatory takings case, *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), rather than as a member of the *Mahon* family. *Penn Central* involved an

effort to erect a 55-story tower on top of New York City's Grand Central Terminal, which the City had designated a protected historic landmark. Penn Central, the owner of the property, sued the City when the Landmarks Preservation Commission denied permission to build the tower. The railroad alleged that the ruling deprived it of the use of its air rights without compensation, violating the Takings Clause.

The Court rejected this approach for several reasons, one of which was its definition of the relevant parcel. According to the majority:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated....[T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the "landmark site."

Id. at 130-31. It reconciled this broad relevant parcel determination with *Mahon* by denying "that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably ... constitutes a 'taking.'" *Id.* at 131 n.27.

In so doing, the Court recast the *Mahon* Court's definition of relevant parcel. Although Justice Holmes explicitly noted that his decision was based on the fact that the regulation made it "commercially impracticable to mine *certain* coal," *Mahon*, 260 U.S. at 414 (emphasis added), the *Penn Central* majority believed the decision was really based on the coal company's expectation that it was buying rights that could be completely exploited, causing it to pay a higher

investment price than it would have paid if the restriction had been in effect at the time of purchase. Indeed, the *Penn Central* Court asserted that *Mahon* was decided "irrespective of the impact of the restriction on the value of the parcel as a whole," thereby implying that the *Mahon* Court never decided the relevant parcel question at all. *Penn Central*, 438 U.S. at 131 n.27.

Regardless of how *Penn Central* characterized *Mahon*, future courts seized on *Penn Central's* sweeping rejection of efforts to "divide a single parcel into discrete segments" as the central lesson of the case. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326-27 (2002) ("*Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole'."). However, as Chief Justice Rehnquist later pointed out, "[t]he Court [in *Penn Central*] gave no guidance on how one is to distinguish a 'discrete segment' from a 'single parcel.'" *Keystone*, 480 U.S. at 517 n.5 (Rehnquist, C. J., dissenting). In effect, then, the anti-severance principle from *Penn Central* is superfluous; of course the Court will not divide the relevant parcel, but the court still must determine what the relevant parcel is.

The year after *Penn Central*, the Court had the opportunity to clarify its relevant parcel ruling and instead added more confusion to the jurisprudence. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Supreme Court addressed a challenge to wildlife protection statutes that prevented the sale and trade of some Native American artifacts because they included feathers from protected eagles killed long before the statutes were enacted. Dealers in the artifacts challenged the law, arguing that the regulation deprived their

property of its value by preventing its sale and trade. The Court disagreed:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66. Therefore, although it is "undeniable that the regulations here prevented the most profitable use of appellees' property," the property was not taken because the regulations did not remove all sticks from the bundle; "for example, [the dealers] might exhibit the artifacts for an admissions charge." *Id.* at 66. The relevant parcel, it seemed, was every possible use of the property at issue, and as long as any potential use remained, the Court would not find that the regulation had "gone too far."

Perhaps, then, *Keystone* can only be understood in the context of *Penn Central* and *Andrus*. Following on the heels of the strong language in those cases, it stands to reason that the Court would focus on the profitable uses of the coal company's property that remained in their bundle rather than the sticks that could no longer be exploited. But the *Keystone* Court took this analysis a step further, not only considering the bundle of property rights in the support estate but also aggregating that (empty) bundle with the (full) bundle of rights in the mineral estate.

Lower courts have read this progression as evidence of a presumption of aggregation, which "tends to reduce the likelihood that courts will order compensation." *District Intown*, 198 F.3d at 885 (Williams, J., concurring). The danger of such a presumption is that it will eventually butt heads with the Takings Clause if it is not carefully applied. As the *Penn Central* Court recognized, "the 'Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'." 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Setting the presumption too strongly against compensation undermines this purpose by sacrificing "fairness and justice" for judicial simplicity.

3. Another Change in Jurisprudence: *Lucas* and *Palazzolo*

Recognizing the danger of defining relevant parcel too broadly, the *Lucas* Court signaled, in dictum, a retreat from *Penn Central's* strong endorsement of aggregation. After noting the confusion produced by its relevant parcel jurisprudence, the Court turned its sights to *Penn Central's* "extreme – and, we think, unsupportable – view of the relevant calculus." *Lucas*, 505 U.S. at 1016 n.7. Again in dictum, the Court moved toward the approach Chief Justice Rehnquist advocated in his *Keystone* dissent, writing that "the answer to this difficult question [i.e., relevant parcel] *may* lie in ... whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* (emphasis added). Unfortunately, this retreat did takings jurisprudence more harm than good, both because it was signaled in dictum and because it was poorly defined. As

Judge Williams of the D.C. Circuit lamented, although "[t]he Court arguably evidenced a retreat from this strong position [taken in *Penn Central*] ... [it] has not, however, reached agreement on the scope of this retreat." *District Intown*, 198 F.3d at 887-88 (Williams, J., concurring).

Therefore, although the Court has come almost full circle – from *Mahon* to *Keystone* and *Penn Central* and back to a *Mahon*-like, narrow definition of relevant parcel in *Lucas* – lower courts are not sure where exactly on the circle *Lucas* left them. Indeed, this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), indicated that it, too, was unsure of the proper relevant parcel definition after *Lucas*. Although the *Palazzolo* Court avoided the relevant parcel issue because of procedural matters, in its brief discussion of "the difficult, persisting question of what is the proper denominator in the takings fraction," the Court recognized the contradictions that developed in its own jurisprudence following *Penn Central*: "Some of our cases indicate that the extent of the deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule." *Palazzolo*, 533 U.S. at 631 (citations omitted). If this Court cannot decide how to interpret its own decisions, it is no surprise that lower courts have encountered great difficulty – as well as vastly different results – in their attempts to do so.

C. Confusion in This Court's Relevant Parcel Jurisprudence Has Caused a Circuit Split

Barely two years after *Lucas*, the Federal Circuit Court of Appeals was invited to try to make sense out of this Court's relevant parcel jurisprudence in *Loveladies*. 28 F.3d 1171 (Fed. Cir. 1994). In 1958, Loveladies purchased 250 acres of land located on Long Beach Island, Ocean County,

New Jersey. *Id.* at 1174. In 1972, the passage of the Clean Water Act brought 51 of those acres – which were wetlands that had yet to be developed – under the control of the Army Corps of Engineers. *Id.* Loveladies also needed permission from the New Jersey Department of Environmental Protection to fill 50 of those acres (one had been filled prior to 1972), and it eventually secured permission from the state to develop 12.5 of the 51 acres. *Id.* Since one of those acres was already filled, the agreement with the state allowed Loveladies to fill 11.5 acres. *Id.*

Loveladies then applied for permission from the Army Corps of Engineers to implement the agreement it had reached with the state. *Id.* The Corps denied Loveladies' application, and the company brought suit for a regulatory taking in the Court of Federal Claims. *Id.* The court ruled in Loveladies' favor, finding that there was a taking because the permit denial caused "greater than 99% diminution of [the land's] value." *Id.* at 1175. The Government appealed.

The Court of Appeals began its consideration of the case by framing the question it thought was presented: "The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large." *Id.* The court acknowledged that its answer to that question hinged on two aspects of "the Denominator Problem." *Id.* at 1179. First, the court needed to determine "whether a regulatory taking requires that there be a denial of essentially *all* remaining economic use, or whether loss of a substantial part, but not all, of the economic use may constitute a compensable taking." *Id.* In other words, the court needed to decide how many sticks may be taken from the *Andrus* bundle before a taking occurs. The precedent, however, was far from clear: "The earlier

cases sometimes use language suggesting that [*all* economic use must be lost], and sometimes did [sic] not. *Lucas* itself contains a discussion that acknowledges both viewpoints." *Id.* at 1179-80.

Recognizing that the answer to the first question necessarily turned on the relevant parcel issue, the court then turned to that "key question." *Id.* at 1180. The facts of the case gave the court the choice of many potential relevant parcels. The government argued that the relevant parcel was either the original 250 acres or, alternatively, the 51 acres that remained undeveloped when the permit was denied. Loveladies, on the other hand, argued that 38.5 of the 51 acres were "dedicated to the state in return for the NJDEP permit," so they should not be considered part of the relevant parcel. *Id.*

The Court of Appeals agreed with Loveladies. It affirmed the lower court's determination that the relevant parcel was only the 12.5 acres that could have been developed under the state agreement but were rendered useless by the federal permit denial. Excluding the contiguous 38.5 acres, although they were part of the original parcel purchased by Loveladies, was "only logical since whatever substantial value that land had now belongs to the state and not to Loveladies." *Id.* at 1181. Using this narrow definition of the relevant parcel, the court returned to the first question it had posed. It held:

> This is not, then, a case of a partial taking, involving linedrawing between noncompensable 'mere diminution' and compensable partial taking. Rather, this is a case in which the owner of the relevant parcel was deprived of all economically feasible use.

Id. at 1181-82 (citations omitted). Therefore, the court ruled that Loveladies was entitled to compensation.

Five years later, the D.C. Circuit Court of Appeals was confronted with a similar issue, and it reached a very different conclusion. In *District Intown*, 198 F.3d 874, the court heard a suit alleging that the District had effected a regulatory taking by denying building permits on lots that had recently been designated historic landmarks. In 1961, District Intown purchased an apartment building and adjacent landscaped lawns in a single transaction. *Id.* at 877. Twenty-seven years later, in 1988, District Intown subdivided the property into nine lots; one lot contained the apartment building, and the other eight were lawn lots on which District Intown planned to build townhouses. *Id.* The following year, the District of Columbia designated all nine lots historic landmarks, bringing them under the control of the Historic Preservation Review Board. *Id.* The Board then denied building permit applications by District Intown in 1991 and 1992 because "construction on the lawn would be incompatible with its historic landmark status." *Id.* at 878. District Intown filed suit in federal court, alleging an uncompensated regulatory taking, and it appealed a summary judgment entered against it.

On appeal, the court recognized that "[u]nder both *Lucas* and *Penn Central* ... we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel." *Id.* at 880. This question, in turn, boiled down to whether the lot containing the apartment building should be considered part of the relevant parcel. If not, the unbuildable lawn lots would have suffered an almost complete diminution in value. If so, however, the nine-lot parcel would retain significant value because of the apartment building.

The court held that all nine lots together formed the relevant parcel. *Id.* at 877. It reached this decision by inquiring "how both the property owner and the government treat (and have treated) the property," *id.* at 880, and it endorsed a four-factor analysis of the issue. The district court had considered "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot," and it found that all four weighed in favor of treating the nine lots as one unit. *Id.* (citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Cl. Ct. 1991)). Aside from "[t]he intentional act of subdivision," neither court found any evidence that the property was treated separately by the company in acquiring, maintaining and managing it. *Id.* Therefore, the Court of Appeals affirmed the decision to treat all nine lots as one relevant parcel, and it likewise affirmed the ruling that there was no compensable taking.

The fact that the courts reached different outcomes in *District Intown* and *Loveladies* is not troubling in itself because the Supreme Court has repeatedly recognized that takings cases require "essentially ad-hoc, factual inquiries." *Keystone*, 480 U.S. at 495. Still, the lower courts' discussions of the relevant parcel issue reveal vastly different understandings of the state of the law. This leaves open the distinct possibility that both cases would have come out differently if they had been litigated in the other court. For example, the *District Intown* court justified treating all nine lots as one parcel on the following grounds:

> The lots are spacially and functionally contiguous. District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years. District Intown presented no

> evidence that, even after subdivision, it treated the lawn lots separately from Lot 106, the lot that contains the apartment building...

District Intown, 198 F.3d at 880. However, the same can be said of the property in *Loveladies*: the land at issue was "spacially and functionally contiguous," purchased together, and managed jointly for more than 25 years. The only difference between any of the lots in the 250 acres was that some of them were filled and sold before the Clean Water Act was passed and others were not. Similarly, one of the nine *District Intown* lots was developed before the parcel was designated a historic landmark, while the others were not. The *Loveladies* court conceptually severed the lots based on when they were developed, but the *District Intown* court found that factor irrelevant.

Therefore, it appears that the *District Intown* court ignored the factors that underlay the *Loveladies* decision, and the *Loveladies* court discounted the considerations that underpinned *District Intown*. This conflict in the circuits will not resolve itself, and it is up to this Court to articulate a clear theory to guide all the circuits in their relevant parcel jurisprudence.

D. Federal Trial Courts Are Also Confused By the Relevant Parcel Issue

Not surprisingly, the uncertainty about the relevant parcel evident in the opinions of the Supreme Court and Courts of Appeals has been magnified as lower courts have struggled with the same issues. Two cases should be sufficient to illustrate this point. Both cases considered allegations of regulatory takings after permit denials by the Army Corps of Engineers. Both were decided in the late 1990s by the same court, the United States Court of Federal

Claims. Despite these similarities, the outcomes of the cases were very different.

In 1997, the court decided *Forest Properties, Inc. v. Big Bear Municipal Water District*. 39 Fed. Cl. 56 (Fed. Cl. 1997). That case involved the denial of a dredge and fill permit for 9.4 acres of lakebottom property adjoining 53 upland acres under the same ownership. Although the court cited the same four factors later cited by the Federal Circuit in *District Intown*, it discounted evidence of "the different dates upon which the upland property was acquired and the option rights [to purchase the lakebottom property] were transferred, the separate consideration that was paid for the upland property, and the option rights." *Forest Properties*, 39 Fed. Cl. at 73. Indeed, it observed that "[t]his court must be wary of focusing solely on the particular facts of a transaction." *Id.* The court, instead, "should focus on how the economic expectations of the claimant, with respect to the parcel at issue, have shaped the owner's actual and projected use of the property." *Id.* In the end, the court found that "FPI's economic intentions were to utilize the lakebottom acreage and the upland parcel in conjunction with each other as one income-producing unit." *Id.* at 74. Therefore, it chose to treat all 62 acres as the relevant parcel, and it found that the permit denial caused a mere diminution in value, not a compensable taking.

Two years later, the court was again invited to address an alleged regulatory taking. *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21 (Fed. Cl. 1999). This time, the Corps denied a permit to mine limestone on land Florida Rock had purchased for that purpose just before the Clean Water Act Amendments passed in 1972. First, Florida Rock applied for a permit to mine the entire 1,560 acre parcel, and this application was denied because "the Corps indicated it would only consider

applications covering mining needs sufficient to satisfy a three year period." *Id.* at 25. Then, Florida Rock again applied for a mining permit, this time only for the 98 acres it could mine in three years. This application was also denied. *Id.*

In considering Florida Rock's taking claim, the Court of Federal Claims determined that the relevant parcel was the 98 acres for which the permit had been denied. *Id.* at 33. It refused to entertain the notion that Florida Rock's inability to mine 6 percent of its wholly-owned contiguous property merely diminished the value of the entire lot. Instead, the court observed that "[r]egulations often require courts to look at entire parcels to determine their impact, but that does not mean property only exists in the form of the entire parcel." *Id.* at 43. Finding that "[t]he frustration of Florida Rock's reasonable investment-backed expectations is beyond doubt ... [and] absolute," the court ruled that the 98 acres at issue had been taken by regulation and Florida Rock was entitled to just compensation. *Id.* at 41.

It is difficult to square this decision with *Forest Properties*. The court in *Florida Rock* was willing to sever 98 wetland acres from 1,462 contiguous and indistinguishable wetland acres owned by the same company and intended for the same purpose, but the *Forest Properties* court refused to sever 9.4 lakebottom acres from 53 upland acres that were purchased separately. Both Florida Rock and Forest Properties purchased the land in question as an investment with expectations that it could be exploited profitably. Both saw their expectations frustrated by the denial of federal permits. Only one received compensation. The confusion and contradiction in the relevant parcel jurisprudence evidenced by these two opinions is representative of the struggle faced by lower courts nationwide in trying to make sense of the "partial theories

and broken concepts" that litter "the landscape of taking law." *Florida Rock*, 45 Fed. Cl. at 23.

III. CONCLUSION

The same year that *Lucas* was decided, this Court famously remarked that "[l]iberty finds no refuge in a jurisprudence of doubt." *Casey*, 505 U.S. at 844. This Court should grant the Emmermans' petition for certiorari to clarify the difficult issue of relevant parcel for litigants and courts across the country.

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